NO. 80-759

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ALBERTO SANCHEZ, et al.,

Petitioners,

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. L, et al.; UNITED STATES OF AMERICA; MARIA MENDOZA, et al., ROY and JOSIE FISHER, et al., SIDNEY L. SUTTON and SALLY SUTTON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX

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Alberto Sanchez, et al.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 78-3352

MARIA MENDOZA, ETC., ET AL.,

Plaintiffs-Appellees,

and

ALBERTO SANCHEZ, NADINE SANCHEZ, BETTY SANCHEZ, GEORGE SANCHEZ, ERNEST SANCHEZ AND JOYN SANCHEZ,

Plaintiffs-Appellants,

and

JULIA O. FLORES, BILLIE GUTIERREZ, THERESA MEDINA, BETTY M. GRANILLO, CAROL CRUZ-POPKIN, BARNEY PAUL POPKIN, CARMEN P. URRUTIA, MANUEL ALVARADO, CAROLYN HACKWORTH, GLORIA HAGLER, JOHNNY RANDOLPH-KELLY, THELMA B. MANRIQUEZ, ADOLFO A. SUAREZ, NAT WASHINGTON, II, RALPH O. GOMEZ, JUAN BRITO, MARCIA ALMEDA, EMILIA TALAMANTEZ, ELLEN LEE, ESPERANZA SILVA, ANTONETTE ROMO, RONALD Q. HUERTA AND LUPE MONTANO,

Plaintiffs-Objectors-Appellants,

v.

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-
Appellee,

v.

TUCSON UNIFIED SCHOOL DISTRICT
NO. 1, ET AL.,

Defendants-Appellees.

OPINION

Appeal from the United States
District Court for the
District of Arizona

Before: CHOY and SNEED, Circuit Judges,
and EAST,* District Judge

Opinion of the United States
Court of Appeals for the Ninth Circuit
Filed June 27, 1980;
623 F.2d 1338

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

EAST, District Judge

The plaintiff-objector-appellant Alberto Sanchez, appearing individually and on behalf of his above-named minors, appeals the District Court's orders entered on August 11, 1978, which approved a submitted plan of desegregation, and August 31, 1978, which approved the settlement arrangement for desegregation of the Tucson School District No. 1. He also appeals the District Court's order of August 11, 1978, which denied the certification of a subclass and various other discovery and post-August 1, 1978 orders of the District Court. We affirm each of the orders appealed from.

In this class action school desegregation appeal, certain members of the minority class, including Sanchez, were dissatisfied with part of the remedy negotiated by attorneys for the class, the United States, and the school officials.

Sanchez was allowed to retain separate counsel and participate, although with a minimal amount of preparation time, in hearings on the School District's desegregation plan and the class action settlement. Sanchez also raises issues concerning discovery, notice, and negotiation of attorney's fees.

I. FACTS

In May of 1974, a school desegregation action was commenced against the Tucson Unified School District No. 1 by Black elementary and junior high school students (Fisher plaintiffs). That case is now on appeal in the consolidated case, No. 79-3378. Several months later, a separate action was filed on behalf of the District's Mexican-American elementary, junior high, and high school students (Mendoza plaintiffs), here on appeal. In late 1975, the Fisher and Mendoza plaintiffs were certified as class representatives for

these Black and Mexican-American classes, respectively. These two causes were consolidated in the District Court for hearing and disposition.

Sidney L. Sutton, et al., a group of white parents opposed to busing, entered as intervenor-defendants in the Fisher action in March, 1975.[1/] In December, 1976, the United States was permitted to intervene as a plaintiff in both actions.

1/ Sutton is an intervenor in the Fisher case only, District Court No. 74-90, and appeals a later order in that case in consolidated appeal No. 79-3378, Fisher v. Tucson Unified School District No. 1, ___ F.2d ___ (9th Cir. 1980), decided today. However, Sutton has no standing to participate in the present appeal because he was not a party to the Mendoza action, District Court No. 74-204, or this appeal. Alberto Sanchez, appellant here, is a party only to the Mendoza case, and his appeal is properly understood as an appeal only of the Mendoza case. Thus, Sutton's attempt to raise additional substantive objections to the August 31st settlement order by a brief filed in this appeal does not place those issues properly before this Court.

The Mendoza amended complaint consisted of seven counts, alleging (1) maintenance of a tri-ethnic segregated school system; (2) discriminatory tracking; (3) inferior curricula and facilities for minorities; (4) discrimination in the hot-lunch program; (5) discrimination in special education programs; (6) failure to take into account linguistic differences; and (7) lack of bilingual notices. Prior to trial, counts 2, 5 and 6 were stayed and severed based upon HEW's approval of the District's compliance plan to remedy these problems; and counts 3, 4, and 7 were dismissed pursuant to stipulation by class counsel.

After substantial discovery, a consolidated trial of the Fisher and Mendoza actions was held in January, 1977. On June 5, 1978, the District Court issued its joint decision, finding that the School District had failed to dismantle its former

dual school system for Blacks and non-Blacks, and had continued since 1954 to discriminate against Black elementary and junior high school students. The Court found no such dual school system had existed with respect to Mexican-American students, nor did any continuing system-wide practice of intentional discrimination occur. The Court concluded that nine schools suffered current effects of the past intentionally segregative acts of the School District, and ordered the District to prepare a desegregation plan with respect to these nine schools.

Post-trial motions were filed by Fisher and Mendoza plaintiffs, joined by the United States as an intervenor, to amend the findings and conclusions, and a hearing was held on June 28, 1978. Before a ruling on these motions, plaintiffs and the School District informed the Court that they were in the process of discussing a

mutually acceptable plan for desegregation of the nine schools, as well as resolution of the other pending issues. Although the Court withheld submission on these motions, it nonetheless ordered the District to submit its proposed plan for desegregation by July 17, 1978. The order further instructed the District to consult with its residents, and the plaintiffs' class members, in order to minimize objections to the plan. Accordingly, the District held a number of hearings and meetings, both for the affected parents and for the District's residents at large. At these meetings, the District presented desegregation options and solicited questions and comments. This process culminated with the District timely

filing its plan for the nine schools on July 17, 1978.[2/] The District Court scheduled a hearing on the plan for August 8, 1978, requiring that written objections be submitted by August 4.

On August 4, 1978, the attorneys reported to the District Court that their discussions had been fruitful: a settlement proposal on all remaining issues in the lawsuits was ready for the Court's consideration. The District Court scheduled a settlement hearing for August 24, 1978, and ordered a proposed form of notice be prepared. It did not disturb

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2/ The District actually submitted several options, indicating the plan it preferred. The preferred plan "called for alteration of numerous student attendance zones, the closing of three old and small inner-city schools and altered transportation patterns for several hundred Anglo, Black and Mexican-American elementary and junior high school students." Brief of Appellee Tucson Unified School District No. 1, at 9 (footnote omitted.)

the upcoming August 8th hearing on the desegregation plan.

The stipulation of settlement adopted the District's nine-school desegregation plan, and included provisions for immediate integration of three additional schools. It required the District in cooperation with parents to examine future assignment policies at several other elementary and junior high schools, and to eliminate discrimination in faculty assignments, employee training, and policies on testing and discipline. Also included were provisions for program improvements, regular District progress reports, oversight, and procedural details.

With respect to the lawsuit, the settlement provided for dismissal of all remaining counts (numbers 2-7) in the Mendoza complaint, and the parties agreed that there would be no further attacks on the District Court's June 5th order, nor on the desegre-

gation plan or the settlement. The settlement also provided for $500,000 in attorney's fees for class counsel. The settlement was concurred in by attorneys for the District, the Fisher class, the Mendoza class, and the United States Department of Justice.

Meanwhile Sanchez took exception to part of the proposed desegregation plan. Specifically he objected to a provision which called for the closure of three of the nine affected schools, believing that it unfairly burdened portions of the Mexican-American class. Sanchez was also dissatisfied with class counsel's acquiescence in the closure of the three schools, and on July 27, 1978, he requested a substitution of counsel. Substitution was ordered on the following August 3.

On August 4, 1978, Sanchez filed a motion to create a subclass comprised of Mexican-American parents and their children

residing in the attendance areas of schools sought to be closed by the District. Argument was heard on this motion on August 7. Also on August 7, Sanchez moved to continue the August 24th settlement hearing, and for additional time to present objections and alternatives to the District's desegregation plan. The settlement hearing was postponed to the following August 30, over the objections of the other parties, but no relief was granted on his request for additional time to object to the plan. That same day, August 7, Sanchez filed and served his first request for production of documents.

Hearings on the desegregation plan were held on August 8 and 9. The School District presented testimony in support of the plan. Due to the settlement, neither the class representatives nor the Government objected or chose to conduct cross-examination, but sought to reserve such

opportunity should the settlement be disapproved by the Court. The District's witnesses were cross-examined by Sanchez, and he was given the opportunity to present evidence. Both Sanchez and Sutton, appellant in No. 79-3378, lodged their objections to the District's plan and presented alternatives. The Court then heard comments on the plan from members of the public.

Two days later, on August 11, the Court issued two orders. First, it approved the District's desegregation plans, finding that they were in compliance with the June 5th order--that they sufficiently remedied the violations found to exist in the nine schools. Second, the Court denied Sanchez's motion for certification of a subclass. It noted that the subclass's reason for existing, objection to the school closures, was mooted by the order approving the desegregation plans. And in-

sofar as its objection reached the settlement itself, the settlement hearing under Rule 23(e) would protect objecting class members.

On August 14, 1978, the District Court approved the form of settlement notice to class members. Printed in both English and Spanish, it was published in Tucson's two daily newspapers.[3/] In addition, copies of the notice were distributed to community groups, merchants and churches in the class members' neighborhoods. The notice contained a brief history of the litigation, a description of the Court's June 5, 1978 decision, a general summary of settlement terms, and a notice of the settlement hear-

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3/ The notice ran for seven days in one of the papers and for six in the other. On the first three days, in both papers, the announcement appeared in the fine print typical of legal notices. On the remaining days, it was published in standard type and highlighted with a black border.

ing.

On August 16, Sanchez filed a motion for discovery in the form of production of documents and interrogatories. The motion was granted on August 22, except as to the issue of school closure, which had been determined in the August 11th order. Responses to the discovery were received on August 25 and August 29.

Just prior to the settlement hearing, the Fisher and Mendoza plaintiffs filed memoranda in support of the settlement, and Sanchez filed papers in opposition. The settlement hearing was conducted on August 30 and 31. The Court limited it at the outset to the question of whether the settlement was "fair, just, and adequate," and declined to entertain testimony on issues which had already been litigated and decided (e.g., school closures). Evidence was taken from the parties at the hearing, and individual class members were permitted

to present testimony. At the close of the hearing on August 31, the Court approved the stipulated settlement.

Sanchez has appealed the order of August 11, the final order entered on August 31 approving the settlement, and several other post-August 1 rulings. Sanchez here questions the Court's refusal to certify a subclass, the form, content and alleged lack of notice, the Court's rulings on discovery and scheduling of the proceedings, and the propriety of negotiating attorney's fees along with substantive issues in the settlement of this litigation. Our jurisdiction to review these issues rests on 28 U.S.C. § 1291.

II. NATURE OF THE ISSUES.

The issues in this case center around its status as a class action school desegregation suit. Both its procedural context as a class action and its substantive context as a school desegregation suit shape

our review and the resolution of the questions presented.

A. Class Action.

Although this case is substantively a school desegregation suit, the issues raised by Sanchez concern the procedural law of class actions. Sanchez does not object to the findings and conclusions in the Court's June 5th segregation decision, nor does he substantively challenge the Court's subsequent approval of the District's desegregation plan or approval of the settlement itself. Rather, Sanchez suggests that procedural infirmities surrounded the consideration and ratification of the plan and the settlement.

Representative suits carry with them an accepted structural risk that conflicts may arise between groups of class members. It may be unavoidable that some class members will always be happier with a given result than others, but potential injustice

arises as the distribution of benefits and burdens in a class remedy becomes increasingly unequal. Although maximizing the overall gain is a valid pursuit in resolving a class action, a small minority of the class members may not be asked to bear an unduly disproportional share of the accompanying burdens. This possibility of inadequate accommodation of the interests of some or many of the class members, particularly absentee members, is a principal structural danger in class suits. See In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir.), cert. denied, 100 S. Ct. 146 (1979); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1213-16 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

Recognizing these inherent risks in class suits, the Rules of Civil Procedure attempt to counter them by imposing procedural requirements on the conduct of such

actions. Fed. R. Civ. P. 23. See Pettway at 1214. In addition, courts have affirmed the special responsibility placed upon the trial judge to protect the rights of absentee class members, as well as those who are named plaintiffs. E.g., Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), cert. denied, 423 U.S. 864 (1975); Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970), cert. denied, 401 U.S. 912 (1971). Overall fairness is the touchstone for evaluating the conduct and resolution of class actions, and the onus for this evaluation is vested in the trial court.

Class actions vary widely in their circumstances, and the procedural protections and judicial responsibilities are necessarily only generally defined. Broad discretion is granted to the trial judge, enabling him or her to respond fluidly to the varying needs of particular cases.

Therefore, although certain factors must be considered and certain procedures complied with, much of the judicial oversight of class actions is in the form of the sound discretion of the District Court. See Pettway, 576 F.2d at 1214; In re General Motors, 594 F.2d at 1133. This will dictate our review of the District Court's actions.

Sanchez separately participated in this suit as one whose interests at the remedy stage of the litigation conflicted with those of other class representatives[4/] and members of the class. As was apparent at the hearings on the desegregation plan and the settlement, at least some other class members share Sanchez's views. Most of Sanchez's complaints in this Court arise from the way the District Court ac-

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4/ Alberto Sanchez was one of the original named plaintiffs in the Mendoza action.

commodated Sanchez's participation as an objector in the remedy and settlement proceedings.

Thus, in examining the accommodation accorded Sanchez, we are for the most part reviewing the District Court's choices of how the required procedures were to be implemented. These are decisions within the general responsibility for judicial control and oversight of class actions, and accordingly are within the Court's broad discretion. Therefore, beyond assuring ourselves that Sanchez's constitutional due process rights were not violated, our standard of review for these choices is whether they reflect an abuse of discretion by the District Court, in light of the circumstances and posture of the case. This posture, i.e., the stage of the proceedings and the questions being addressed, will in part be determined by substantive school desegregation law.

B. School Desegregation Context

Many of Sanchez's complaints charging the District Court with failing to properly accommodate his objections to the school closures are grounded on a fundamental misunderstanding of the purpose of the school closure question following the August 11th order approving the desegregation plan. Sanchez's complaints that the school closure issue was not properly considered in the procedures surrounding the settlement hearing assume the continuing vitality of this issue after the August 11th order, and what remained to be considered in the settlement proceedings, are determined by the law governing school desegregation remedies in the federal courts.

When a federal court finds that a public school system operates in a manner infringing upon some students' federal constitutional rights, the Court is empowered to prescribe a suitable remedy. Keyes v.

School District No. 1, Denver, Colo., 413 U.S. 189 (1973); Wright v. Council of City of Emporia, 407 U.S. 451 (1972); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). In the first instance, however, the Court must give the local school officials an opportunity to devise changes sufficient to bring the schools' operations within the constitutional standards. Swann at 16. See Brown v. Board of Education, 349 U.S. 294 (1955). If the school officials present a plan which will correct the violations found, and it does not infringe upon other rights in the process, the District Court must approve that remedy even if the Court does not believe it was the most desirable plan which could

have been selected.[5/] See Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977); Milliken v. Bradley, 418 U.S. 717 (1974).

In the present case, the District Court in its June 5th decision found continuing constitutional violations at nine Tucson schools, and it ordered the School District to prepare a remedial plan. On July 17, 1978, following public hearings, the District filed with the Court several plans to correct the violations, desig-

5/ This does not, of course, in any way, diminish the District Court's obligation to carefully scrutinize a school district's proposal, to be sure that it does in fact satisfactorily correct the adjudged constitutional informities. Too often have remedies been proposed which merely perpetuate the segregative status quo. See, e.g., Green v. County School Board, 391 U.S. 430 (1968); Monroe v. Board of Commissioners, 391 U.S. 450 (1968). The Court's responsibility to review and reject such thinly veiled forms of continued discrimination is at the very heart of its judicial function. But when the school district has submitted a plan which survives this searching inquiry, it must be accepted.

nating the options it preferred. The Court held hearings on this plan August 8 and 9. On August 11, the Court issued an order finding the options acceptable remedies for implementation in September, 1978. This plan included involuntary busing of some students and the closing of three of the nine designated schools.

The hearing on August 8 and 9 was specifically and solely directed to the question of whether the District's desegregation plan remedied the constitutional violations found in the June 5th order, and whether it did so in a constitutional manner. The District Court's understanding of its role was consistent with the limited remedial jurisdiction of the federal courts in school desegregation cases. As the Court noted in its August 11th order:

> "The remedy which this Court has authority to order must work, it must work now, and it must not inflict additional burden on plaintiffs and the classes they

> represent, nor inflict further racial or ethnic segregation or discrimination on such plaintiffs. This Court's jurisdiction or power does not extend any further than that. Concerning all other interests, parents and others must look to their elected officials.
>
> ***
>
> "At present, the Court must rule only on the issue of whether the defendants' proposed plans for the upcoming school year sufficiently remedy the violations heretofore found to exist with respect to nine schools."

The District Court went on to observe that the closing of the three schools was not required by its June 5th order, but that those closures were compatible with it. The Court's careful examination of the school closures determined that they would not place an undue burden on minority students. Finally, the District Court concluded that the proposed plans were "acceptable remedies for the constitutional violations heretofore found."

We believe the District Court properly perceived its role in reviewing the desegre-

gation plan. The August 11th approval of the District's desegregation plan was an independent judgment of the District Court conclusively deciding the permissibility of the plan, including the school closures, for the 1978-79 school year. With this understanding of the status of the school closure issue as of August 11, we can proceed to examine the specific issues raised by Sanchez.

III. SPECIFIC PROCEDURAL ISSUES

Sanchez argues that approvals of the desegregation plan and the class action settlement were done in violation of the objectors' procedural rights. We address his several assignments of error below.

A. Timing

Sanchez first objects to the short period of time available to him to prepare for the plan hearing and the settlement hearing.

1. The Plan Hearing

The timing of the plan hearing is one of the more troubling issues raised by Sanchez. He correctly points out that he was allowed very little time to prepare his objections to the plan. The desegregation plan was submitted on July 17, Sanchez requested substitution of counsel on July 27, and the hearing was held August 8 and 9. In addition to objecting to the plan, Sanchez was simultaneously advancing a subclass motion and preparing discovery requests.

We have no doubt that Sanchez received sufficient opportunity to be heard to satisfy constitutional due process requirements. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The closer question is whether the District Court abused its discretion in its scheduling of the remedy hearings, given its awareness that there were objections

from within the class.

The fact that the action before the Court is a class suit imposes special responsibilities upon the trial judge. As noted above, representative suits carry with them inherent dangers of conflict and compromise of absentee interests. Accordingly, a Court overseeing a class suit must constantly be sensitive to conflicts within the class. See Note, Developments in the Law -- Class Actions, 89 Har. L. Rev. 1318, 1490 (1976) (judicial awareness of differences within a class as a protection of absentee interests). The Court must be well informed of the views of objectors, and serve as a guardian of absentee interests. Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832 (9th Cir. 1976); Greenfield v. Villager Industries, Inc. 483 F.2d 824, 832 (3rd Cir. 1973). Cf. Norman v. McKee, 431 F.2d at 774 (context of Rule 23(e)).

However, the desegregation plan was not a settlement, and was not bound by the more formal Rule 23(e) requirements. Fed. R. Civ. P. 23(e). With respect to the proposed plan, the District Court's responsibility was to assure itself that it had before it all relevant arguments, objections, and considerations concerning the plan. The extent, timing and even existence of the plan hearing rested largely within the discretion of the trial court.

Review of a trial court's discretion must always be done in light of the circumstances of the case. See Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976). In addition, we are not to substitute our ideas of fairness for those of the trial court in the absence of evidence that it acted arbitrarily, Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767, 771 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976), and such evidence must constitute

a "clear showing" of abuse of discretion, Flinn v. FMC Corp., 528 F.2d 1169, 1172 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976). In re Gypsum Antitrust Cases, 565 F.2d 1123, 1128 (9th Cir. 1977). Unless we find that the exercise of discretion was arbitrary and constituted plain error under the circumstances, we will not reverse. See Bowles v. Quon, 154 F.2d 72, 73 (9th Cir. 1946).

It is significant that the settlement and objections have come at the remedy stage of this litigation, and not during pretrial proceedings as do many class action settlements. Here, the District Court was particularly well informed about the action, having been intimately associated with it for over four years. This association included a full trial on the merits, familiarity with a voluminous amount of evidence, and a lengthy and detailed written decision. The Court was

able to assess the relative merits and significance of a given argument or objection, and determine the amount of detail needed in the presentations. A further element properly in the Court's consideration was the desire to implement whatever plan was approved at the start of the next school year in September.

The District Court could also assess Sanchez's opportunity to prepare his objections to the plan. First, Sanchez had been involved in the case from its commencement as one of the original named plaintiffs in the Mendoza action, placing him in a different position than that of a passive, insulated class member. Second, Sanchez requested substitution of counsel on July 27, meaning that he and his attorney had at the minimum nearly two weeks in which to prepare their objections to the plan. Third, it was clear from the District Court's order establishing the August

8th hearing that it was not a settlement hearing, but rather focused only on the acceptability of the desegregation plan. As discussed above, this was limited to an examination of the adequacy of the District's plan in acceptably correcting the constitutional violations found in the Court's June 5th decision. There was nothing misleading in the Court's order, and Sanchez should have been aware of the narrow focus of the August 8th hearing. Given these considerations, the Court could properly decide that Sanchez could prepare a presentation for the hearing sufficient to inform the Court of potential constitutional problems the plan might contain for those who, due to a conflict of interests within the class, were not adequately represented by class counsel on the issue of school closure.

Thus, in light of these circumstances, we cannot say the District Court abused its

discretion in not postponing the plan hearing.

2. The Settlement Hearing.

Sanchez also contends that he was not afforded adequate time nor sufficient discovery to prepare for the August 30th settlement hearing. Initially we conclude that Sanchez's opportunity to be heard was not so limited or so nominal that it violated due process requirements. See Mullane, supra.

Our second inquiry is whether the District Court abused its discretion in not continuing the settlement hearing further into the future.[6/] Fed. R. Civ. P. 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court . . ." It further

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6/ The Court granted one request by Sanchez for a continuance, postpoing the hearing date from August 24 to August 30.

requires that notice of the settlement[7] be sent to class members, and though not mandatory, generally a hearing on the settlement is held.[8] Patterson v. Stovall, 528 F.2d 108, 114 (7th Cir. 1976). See Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974). Notice and hearing are provided to assure that there are no unrepresented interests which are unfairly treated by the settlement. Absent class members are afforded an opportunity to come forward and make the Court aware of any undisclosed inadequacies. See Norman v. McKee, 431 F.2d at 774; Pettway, 576 F.2d at 1214-16. Particularly at the settlement stage, the Court must be keenly aware of

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7/ Sanchez also contests the form of content of the notice given in this case. See section III-C, infra.

8/ In school desegregation cases, however, hearings on proposed remedies are almost universally held, and it may well be an abuse of discretion not to conduct one.

its role as a "fiduciary [serving] as a guardian of the rights of absent class members." Grunin, 513 F.2d at 123.

The form which the Rule 23(e) procedural protections take is clearly left to the discretion of the trial court. Fed. R. Civ. P. 23(e). The Court must have before it sufficient information to assure itself that there were not procedural defects in the reaching of the settlement, and that the substantive terms of the settlement are fair and reasonable. Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977); Norman, 431 F.2d at 774; Grunin, 513 F.2d at 123. Although the Court must be particularly sensitive to any sacrifice of minority interests, there will generally have to be some compromise where, as here, the remedy sought is pervasive structural relief necessarily affecting all class members. The trial court must be able to determine if the balance struck is

is basically fair, looking to the benefits to be achieved by the class as a whole, as well as the distributive effects.

The question presented here is not whether the trial judge was correct in his substantive determination of fairness, but whether he abused his discretion in his scheduling of the settlement hearing. Because the purpose of a settlement hearing is to insure the opportunity for all relevant facts and objections to be placed before it to intelligently evaluate the settlement proposal. Detroit v. Grinnell Corp., 495 F.2d at 462-63; Newman v. Stein 464 F.2d 689, 692 (2d Cir.), cert. denied, 409 U.S. 1039 (1972). And in reviewing this question, we must accord great weight to the trial judge's views. He was close to the litigants and the case, was far more familiar with it than this Court, and in a superior position to perceive what needed to be known. Cf. Ace Heating & Plumbing

Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971).

Here, Sanchez had at the minimum nearly a month to prepare for the settlement hearing, and his discovery requests were granted[9/] (except as to the issue of school closure which had been rendered moot by the Court's August 11th order).[10/] Sanchez had been involved in the case from its inception, and there was a voluminous

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9/ Sanchez received his requested material on August 25 and 29. He could, however, have chosen to use more expedient discovery procedures, or requested accelerated returns for his requests.

10/ Sanchez suggests that denial of discovery on the issue of school closure was improper, and that there exist relevant and unsubmitted facts on this issue. However, as discussed above, the Court's August 11th order approving the desegregation plan properly affirmed its constitutionality and rendered further proceedings on the school closure issue moot. See section II-B, supra. We understand from Sanchez's brief that given this view of the Court's August 11th order, he concedes that the objectors would not be entitled to discovery on the school closure issue.

resource of material already available. As it was, the District Court postponed the settlement hearing for one week on Sanchez's motion over the settling counsel's objection. Further, Sanchez has not demonstrated to this Court any relevant facts or objections which were not placed before the District Court.[11/]

11/ Sanchez argues that the desegregation plan was a part of the settlement, and thus should have been open to attack at the August 30th settlement hearing. To support his position, he points to the fact that the class attorneys did not object to the plan at the August 8-9 hearing, and that the plan was identified in the settlement. First, the substance of the plan was reached two weeks before the stipulation of settlement, and there is no evidence that the plan itself was a product of settlement negotiation. Second, even if it were the result of settlement negotiations, this would not necessarily preclude the District Court from independently assessing whether the plan conformed to the June 5th order. Ordinarily, some sort of adversary proceedings would be an important part of the process leading to a District Court's independent judgment. Here, however, the trial court judge was thoroughly familiar with the case. Moreover, there was in fact adversary presentation at the plan

In light of these circumstances, we believe that the District Court had sufficient information before it from all viewpoints to evaluate the fairness of the settlement. Moreover, it appears that no significant objections were suppressed by the District Court's decision to deny any further continuances of the settlement hearing. We find no abuse of discretion

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hearing by Sanchez and others. Finally, as discussed in the text (see section II-B, supra), the Court ruled upon the question of the plan's constituionality in its August 11th order. Consequently, it cannot be maintained that the merits of the plan itself remained an open question at the settlement hearing.

in the scheduling of the settlement hearing.[12/]

12/ Sanchez relies heavily on Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979), in arguing that the presence of objectors to a settlement should have invoked more accommodation by the District Court. Such reliance is misplaced. In Pettway, there was a far more pervasive class rejection of a proposed settlement which led the Fifth Circuit panel to believe the trial court had abused its discretion in approving the Title VII class action settlement. There, each of the active class representatives objected to the settlement, the elected members of a workers' committee actively overseeing the litigation rejected it, and at least 70 percent of the class (and perhaps more) opposed the settlement. Id. at 1214 & n.70. While we do not suggest that the quantity of objectors will determine whether a settlement proposal should be rejected, that factor, among many other factual distinctions, renders Pettway a poor factual analogue to this case. We do, however, find our holding here to be consistent with the general standards of class action law discussed and applied in Pettway.

B. Request for Subclass Certification

Sanchez moved for certification of a subclass, with himself as a class representative, to include those class members who would be directly affected by the school closure provisions of the desegregation plan.[13/] The District Court denied this certification motion simultaneously with its approval of the plan, finding, inter alia, that there was no longer any need for a subclass formed to object to school closures because the issue was

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13/ The proposed subclass was described as follows:

> "[A]ll Mexican-American or Hispano-American students or students with Spanish Surnames with grades K through 8 in Tucson School District Number One, and the parents, guardians and/or next friends of those students, who now attend or will in the future attend a school subject to or proposed to be, immediately or in the future, closed by order of this Court or proposed settlement by the parties."

decided on the merits by the approval of the plan, and, furthermore, the subclass description was vague. We agree with the District Court that after the August 11th order, the need for the subclass disappeared.

Subclasses must meet the same requirements as a class. Weathers v. Peters Realty Corp., 499 F.2d 1197, 1200 (6th Cir. 1974). Just as the determination of class certification rests within the sound discretion of the trial court, James v. Ball, 613 F.2d 180, 186 (9th Cir. 1979); Montgomery v. Rumsfeld, 572 F.2d 250, 255 (9th Cir. 1978), so, too, does the determination of the need for a subclass. It is appropriate to invoke subclassification when there are or may be divergent views among class members and when the Court believes that subclasses would materially improve the presentation of all relevant considerations.

Sanchez's arguments that the District Court erred in denying his motion for subclass certification stem principally from his misunderstanding of the Court's August 11th order. As discussed in section II-B above, the August 11th order finally decided on the merits the question of whether the schools sought to be closed by the School District would in fact be closed. Thereafter, the role that the school closures were to play in the settlement hearing became second order: Their existence could be considered in terms of the overall fairness of the settlement, but the fact of the closures themselves were no longer open to objection. Thus, the substantive question of whether those three schools would or could be closed was not, contrary to Sanchez's argument, present at the settlement hearing.

The foreclosure of this issue from the settlement strikes at the heart of the sub-

classification motion. The need for the subclass was premised upon the desire to prevent the schools from being closed, a desire apparently shared by a significant number of parents whose children attended those schools. However, it is not at all clear where the proposed subclass stood on the overall fairness of the settlement, given as irrevocable the decision to close the schools under the District's plan. Nor is it clear that their views on this question differ from the interests of the class as a whole. Finally, it does not appear that the District Court was deprived of any material viewpoints, objections, or information for want of a subclass at the settlement hearing.

For the foregoing reasons, we find no abuse of discretion in the District Court's denial of Sanchez' subclass motion.

C. Notice

Sanchez objects to both the form and the content of the settlement notice.[14/] He contends that the failure to mail individual notice to class members was a violation of due process. He asserts the same complaint about the tardiness and form of the newspaper notice. With respect to content, Sanchez notes that the notice did not (1) advise that counts 2, 3, 5 and 6 of the Mexican-American complaint would be dismissed with prejudice; (2) name the specific schools to be closed under the approved desegregation plan; or (3) reveal

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14/ Sanchez also argues that notice was required before the August 8th and 9th hearings on the desegregation plan. He contends that because the plan ultimately became a part of the settlement proposal, the plan hearings became de facto settlement hearings, requiring all the commensurate procedural formalities, including notice. Because we reject this view of the August 8th and 9th hearings, see section II-B, supra, we also reject any claims that notice to the class was required prior thereto.

any formula for division of attorney's fees among the class attorneys. He claims that these omissions rendered the notice defective.

Rule 23(e)[15] requires that notice to the class be given of any proposed class action settlement.[16] Although the rule

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15/ Fed. R. Civ. P. 23(e) provides:

> "(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

16/ Appellees suggest that notice may not have been required here at all, inasmuch as the action had already gone to judgment on the merits. We disagree. In many 23(b)(2) class actions, and in school desegregation cases in particular, there are significant issues which remain after judgment which do not lend themselves to simple and straightforward resolution. The broad scope of potential injunctive relief and the variety of remedies available raise the possibility that interests may be compromised. The procedural protections attached to the initial action should also be considered applicable to the remedy phase in such circumstances, at least as a matter of proper class action administration.

accords a wide discretion to the District Court as to the form and content of the notice, due process requires its presence and constitutional adequacy. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172-77 (1974); Grunin, 513 F.2d at 121. To meet this standard, the notice given must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314. Further, in applying Rule 23(e), this Court has noted that it reasonably demands that notice be given "in a form and manner that does not systematically leave an identifiable group without notice." Mandujano, 541 F.2d at 835.

1. Form

The notice of settlement approved by the District Court was published 13 times in a seven day period in the two major

Tucson newspapers, [17] beginning eight days before the August 30th and 31st settlement hearing. The notice was printed in both English and Spanish, and copies were provided to the local broadcast media, and were distributed to numerous locations throughout the minority community which are frequented by large numbers of class members.[18] Further, the trial court observed in its notice order that there was a "great amount of local publicity concerning all prior orders and proceedings." All members of the class necessarily lived within Tucson School District No. 1, an area served by the newspapers carrying the notice, and were subject to all of the additional publicity generated by the suit.

17/ See note 3, supra.

18/ Copies of the notices were delivered to many local merchants, churches, community centers, etc.

We believe this form of notice was reasonably calculated to reach the members of the class. A party's capability to provide individual notice does not make such notice mandatory when notice by publication will suffice. In a class action seeking a structural injunction, notice is intended to encourage those with divergent views to come forth, helping the trial court to identify possible inadequacies in the settlement. In general, in such cases seeking a structural remedy, publication notice sufficiently accomplishes this major purpose. See Developments, supra, at 1566. Here, in particular, there was widespread actual notice of the settlement and the hearing as a result of the published notice and other sources, and a number of class members did in fact come forward to object. It being reasonably concluded that this form of notice would be effective, and with the subsequent

indications that it did in fact reach large numbers of the class, we find no abuse of discretion or violation of due process in the form of notice provided here.

2. Content

Nor do we find any infirmity in the content of the notice provided. Notice in a class suit may consist of a very general description of the proposed settlement. Grunin, 513 F.2d at 122. It "must present a fair recital of the subject matter and proposed terms." Holiday Magic, Inc., 550 F.2d at 1177. Here, the specific omissions which Sanchez notes are not fatal to the document.

The content of this notice provides a fair and general summary of the settlement. It first identified the members of the class to whom it was directed, briefly mentioned the background of the case, described the Court's June 5th desegregation order,

and identified the nine schools requiring desegregation. The notice then went on to describe the proposed settlement. It cited the options under which the nine schools would be operated; identified the additional three schools which would have assignment patterns altered; identified additional schools whose assignments would be studied; mentioned additional procedural points of the settlement; and disclosed that a $500,000 attorneys' fee (including costs) had been agreed upon and incorporated. The notice also informed the reader where a copy of the stipulation of settlement and the desegregation plan could be obtained, announced the time and place of the settlement hearing, and concluded by inviting any class member to file written objections or to appear and be heard by the Court.

Sanchez relies on In re General Motors Corp. Engine Interchange Litigation, 594

F.2d 1106, in arguing that the failure to disclose the division of the agreed-upon attorneys' fees rendered notice defective. We do not find this case factually analogous to General Motors. The General Motors case was procedurally complex--many class actions had been consolidated, the Attorneys General of most states were participating as well as private attorneys, and only a small committee conducted the settlement negotiations, perhaps without authority to do so. We do not believe that the same potential for abuse and undue influence existed here. Moreover, the total amount of fees to be paid here was disclosed, and only two sets of attorneys were to participate in its division. While disclosure as to apportionment of the negotiated attorneys' fees may have been desirable, we cannot say it was an abuse of discretion to approve the settlement notice without such a provision.

Sanchez further objects to the notice because it does not specify that three schools will be closed under the desegregation plan. The notice merely states that these schools "will be operated. . . in accordance with [certain options] of the plans submitted to the court on July 17, 1978." Again, this argument loses force when the school closure question is viewed in proper perspective. If the merits of school closure were subject to debate at the settlement hearings, this omission might well be fatal. However, because the school closures only assumed a subordiante role at this hearing, they could be described in the same general terms applicable to other portions of the settlement notice. The notice generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard. We find the content

of the settlement notice to be adequate.

D. Attorneys' Fees

Finally, Sanchez complains that the simultaneous negotiation of attorneys' fees and substantive issues in the settlement discussions was improper. He describes possible trade-offs between additional benefits to the class and attorneys' fees, and argues that these are improprieties which should weigh toward reversal.

Although we find the scenarios offered by Sanchez to be no more than suggestive of mere potential conflicts, we cannot endorse the procedure used here to reach agreement on attorneys' fees. Negotiation is necessarily a give and take process, and all active elements are weighted in the balance. We cannot indiscriminately assume, without more, that the amount of fees have no influence on the ultimate settlement obtained for the class

when, along with the substantive remedy issues, it is an active element of negotiation. See Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977). Nor do we believe that this potential conflict disappears simply because there is no fund or money damanges being negotiated. Financial consequences of injunctive relief are a significant consideration to the institution negotiating a remedy, and the potential conflict[19/] between class counsel

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19/ We do acknowledge, however, that danger of impropriety may not be as great here as when there is one fund from which both the class award and the attorneys' fees are to be apportioned. In such a case, where the defendant is indifferent as to the allocation, the conflict is more direct. These are appropriate circumstances for the District Court to take into account. See, text following note 18, infra. Cf. Schlensky v. Dorsey, 574 F.2d 131, 150 (3d Cir. 1978) (simultaneous negotaition permitted in shareholders' derivative suit because defendant had interest in maximizing class recovery).

and the members of the class remains.[20/]

Whether the existence of this potential conflict requires a trial court to reject a settlement proposal depends upon the circumstances of each case. The presence of simultaneously negotiated attorneys' fees should cause the court to examine with special scrutiny the benefits negoitated for the class. It would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiation took place. But rejection of a settlement is not automatically required in such cases--there may be circumstances present which appear to neutralize the potential for impropriety.

20/ We do not make any findings that there were in fact improprieties in the negotiation of this settlement. However, "[t]he court does have the duty to see to it that the administration of justice has the appearance of propriety as well as being so in fact." Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977).

Such a judgment is appropriately within the sound discretion of the trial judge who can be sensitive to the dynamics of the situation. Thus, while we strongly discourage the simultaneous negotiation of attorneys' fees and substantive issues in class action settlement negotiations, accord, Prandini, 557 F.2d at 1021, we do not believe rejection of a resulting settlement in every case is appropriate.

This case, while presenting the evil of simultaneously negotiated attorney fees, also contains such neutralizing elements. The United States Department of Justice has been an active participant in this case on the side of the plaintiff class since before the trial on the merits. It participated in the negotiations leading to settlement, and placed its imprimatur on the ultimate proposal. The participation of a government agency in such proceedings serves to protect the interests

of the class against possible improper dealings. Its concurrence in the approval of a settlement is properly an element for the Court to consider. Holiday Magic, Inc., 550 F.2d at 1178. See Developments, supra, at 1563. We believe this participation to be a significant factor in quieting the potential for unfair treatment of minority interests within the plaintiffs' class. While the Justice Department's involvement is not determinative of any issue, it weighs favorably in issues focusing on potential unfairness to absentee interests. Further, we believe it to be of some mitigating value that there was statutory authorization for an award of attorneys' fees to plaintiffs. See 20 U.S.C. § 3204 (formerly 20 U.S.C. § 1617). Again, while this is not determinative, and not a justification for class action parties to engage in simultaneous negotiation in the future, we believe it is a mitigating factor pro-

perly considered in this case. Under these circumstances, we do not believe that the trial judge abused his discretion in approving the settlement.

CONCLUSION

Sanchez has raised issues concerning the conduct of the class action proceedings in this school desegregation suit. Generally, we believe Sanchez has misunderstood the nature of the District Court's approval of the desegregation plan, as it related to the issues of school closures. Specifically, as discussed above, we find no due process violations or abuse of discretion in the trial court's decisions on timing, discovery, subclass certification, notice, or settlement approval in light of the attorneys' fees negotiations. All other contentions raised by Sanchez have been considered and found to be meritless. The District Court orders appealed from are affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	No. CIV 74-90-TUC-WCF No. CIV 74-204-TUC-WCF ORDER
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: June 5, 1978

IT IS ORDERED that:

1. The attached Findings, Conclusions, Schedules and Exhibits are hereby adopted as the Court's Findings of Fact and Conclusions of Law in these consolidated actions, subject, however, to the provisions of Rule 52(b), Federal Rules of Civil Procedure.

2. Defendants shall propose a plan designed to eliminate any vestiges of racial and ethnic segregation or discrimination, based on race or ethnicity, which have been found by the Court.

3. Such plan shall be developed and submitted to the Court with all due speed so as to be subject to hearing and review and thereafter commence with the beginning of the 1978-79 academic year, if possible.

4. Defendants are hereby enjoined from any acts or policies which deprive any student of equal protection of the law whether by intentional segregation or

discrimination based on a student's race or ethnic grouping.

5. Defendants are hereby enjoined until further order of the Court, from undertaking the construction of new schools or of permanent additions at existing schools without the specific authorization of the Court.

6. Counsel shall file concise memoranda within ten (10) days of the date of the filing of this Order, setting forth the views of the parties as to a proper and expeditious manner in which to proceed hereafter in these cases.

7. Hereafter, and until further order of the Court, all acts and/or policies of the District which substantially affect the racial or ethnic balance in any school in the District and/or which are discriminatory because based on race or ethnicity of any students in the district schools, shall be subject to Court review in these cases.

8. The Court shall retain jurisdiction over all aspects of these cases until such time as any and all effects of any and all discriminatory and/or segregative acts or policies of the District have been erased or until such time as the cases and/or the issues raised therein have otherwise been disposed of according to law.

9. Count Eight of the amended complaint in CIV 74-204-TUC-WCF is dismissed as to all defendants; the action is dismissed as to all defendants sued in their individual capacities. There is no just cause for delay. The Clerk shall forthwith enter judgment accordingly as to Count Eight and as to the defendants in their individual capacities.

DATED this 5th day of June, 1978.

s/William C. Frey
William C. Frey
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: July 19, 1978

W.J. Furstenau, Clerk
United States District Court
for the District of Arizona

By s/s
Deputy Clerk

IT IS ORDERED that:

On or before Monday, July 17, 1978, at 5:00 P.M., the defendants shall file a proposed plan or plans designed to eliminate any vestiges of racial and ethnic segregation or discrimination based on race or ethnicity which have been found by the Court. If alternatives are presented, the defendants shall indicate an order of preference. The defendants shall, without delay, take reasonable steps to inform the residents of the District of the contents of the proposed plan or plans and of any action by the School Board for the formation or creation of a citizens advisory group or for allowing other citizen participation and comment.

Counsel for plaintiffs shall, without delay, take all reasonable steps to assist in informing the members of the respective classes of the contents of the defendants' proposed plan or plans, and shall make provision to hear objections and suggestions by members of the classes they represent. Before 5:00 P.M., Wednesday, August 2, 1978, plaintiffs shall file any objections to defendants' proposed plan or plans together with any proposed additions, amendments or alternative plans of plaintiffs. Plaintiffs shall further set forth the extent to which members of their respective classes agree or disagree with their objections or proposals.

Before 5:00 P.M., Friday, August 4, 1978, the defendants shall reply to any objections and/or proposed additions, amendments or alternative plans filed by plaintiffs. Defendants may revise any of their proposals by changing preferences, by

amending proposed plans, by offering additional proposed plans or otherwise. They may report the results of any public participation programs which they may have instituted and may adopt or reject such proposals.

In addition to participating in any programs set up by the defendants or the plaintiffs in this case, residents of the School District, and particularly parents of children who may be directly affected by any plan of desegregation may individually, or in groups through a spokesman or attorney, address to the Court, in writing, comments on any plan or plans proposed by the School Board or by the plaintiffs. Any written comment addressed to the Court should be reasoned and/or constructive in nature and should include suggestions or alternatives explaining how the plans may be improved. All comment should be signed, and should be mailed or hand delivered to:

School Desegregation Plan
Clerk, United States District Court
U.S. Courthouse
55 East Broadway
Tucson, Arizona 85701

On August 8, 1978, commencing at 8:30 o'clock A.M., there will be a hearing in this Court concerning the proposed plans. Residents of the District who wish to be heard in open Court concerning their objections and/or alternatives to the proposed plans shall include a request in their written comments. All written comment and requests to be heard must be received no later than 5:00 P.M., Friday, August 4, 1978. Those responding shall state whether they have children attending District No. 1 schools and which schools they attend. Those who speak at the hearing shall be prepared to be sworn as witnesses and may be cross-examined by the attorneys for the parties to this action.

At the August 8th hearing, defendants shall present their proposed plan or plans and

shall offer evidence in support thereof. Plaintiffs shall then present their objections to defendants' plan or plans as well as any amended or alternative plans and shall offer evidence in support of their contentions. Following the presentation of evidence by the parties, members of the public shall be given an opportunity to be sworn and to offer statements not to exceed ten (10) minutes in length. Speakers shall be heard in this order:

1. Those who have requested in writing an opportunity to speak and who are parents of children who may be directly affected by the desegregation plan;

2. Others who have requested in writing an opportunity to speak;

3. If time allows, others who appear at the hearing.

All parties to this action and their attorneys are responsible for the public

dissemination of this Order and for explaining the opportunities herein provided by the Court for public comment and participation.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Order to all counsel of record herein.

DATED this 17th day of July, 1978.

s/William C. Frey
William C. Frey
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: August 4, 1978

Clerk, U.S. District Court
District of Arizona

By s/s
Deputy Clerk

A proposed settlement having been filed in these consolidated actions, it is necessary that members of the plaintiff classes be given notice of the proposed settlement and an opportunity to object thereto or otherwise be heard thereon.

IT IS ORDERED that a hearing is scheduled regarding the proposed settlement in the United States Courthouse, 55 East Broadway, Tucson, Arizona, on Thursday, August 24, 1978, commencing at 9:00 A.M. Any class members desiring to object to the proposed settlement or otherwise be heard may appear and be heard.

IT IS FURTHER ORDERED that counsel supporting the proposed settlement prepare a notice to the classes which explains the proposed settlement and the opportunity

to object to the proposed settlement; counsel shall submit the notice to the Court for approval.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Order to all counsel of record herein.

DATED this 3rd day of August, 1978.

s/s
William C. Frey
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER APPROVING DESEGREGATION PLANS
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: August 11, 1978

In this Court's Order of June 5, 1978, these defendants in these consolidated cases were ordered to propose a plan designed to eliminate any vestiges of racial and ethnic segregation or discrimination, based on race or ethnicity, which were found by the Court to exist in nine schools. The plan was to be developed and submitted with all due speed so as to be subject to hearing and review and thereafter commence with the beginning of the 1978-79 academic year, if possible.

Various plans have been offered by the defendants for the upcoming school year, and their preferences have been indicated. Although all named plaintiffs were given the opportunity to object to the defendants' plans and to offer alternative plans of their own, only Alberto Sanchez has done so.

All other named plaintiffs have entered into a proposed settlement with the defendants which resolves all issues raised

in these consolidated cases. As part of the settlement, the plaintiffs, other than Sanchez, have raised no objections to the plans offered by the defendants as to the nine schools included within the Court's June 5, 1978 Order. As part of the proposed settlement, the defendants have agreed to provide better racial and ethnic balance in certain other schools starting in 1979, and have further agreed to institute various programs designed to improve the quality of education.

Because of a difference of opinion between plaintiff Sanchez and all other named plaintiffs concerning what an acceptable remedy may be, he has asked to have a "sub-class" certified which he would represent in all further proceedings in these actions. This issue is addressed in a separate Order.

Hearings were held on August 8th and 9th, 1978, at which defendants presented

evidence supporting their plans for the nine schools. Plaintiff Sanchez and the intervenor-defendants Sutton, et al., objected to parts of the plans and presented alternatives. Thereupon, parents of children in the affected schools and the public at large were provided an opportunity to present evidence, object to the defendants' plans and offer alternative plans. Over 25 people appeared and spoke on behalf of themselves, their children, friends and neighborhood and school groups.

During the course of these hearings, the Court attempted to explain to the participants the limited jurisdiction of the federal courts in these types of cases, and it is appropriate to repeat those limitations here. Under our federal system, the powers of government are divided between the United States, the individual states, and the people themselves. The administration of schools is a matter

firmly within the control of the individual states.

Arizona has delegated substantially all of its powers to the school districts, superintendents of schools, officers and elected trustees of school districts, such as the defendants in these cases. With very few limitations, they virtually have full authority concerning public education. The people control these decisions through the exercise of their right to elect officials, to engage in free debate and to petition the officials for redress of grievances. The United States may control such local school district decisions only insofar as the Fourteenth Amendment and other constitutional provisions allow.

The jurisdictional grants by Congress and other complaints filed by the plaintiffs in these actions afford this Court the authority to protect the interests of

the plaintiffs in receiving an equal educational opportunity. To the extent that intentional racial or ethnic segregation or discrimination has been found, this Court has authority to order remedies. The remedy which this Court has authority to order must work, it must work now, and it must not inflict additional burden on plaintiffs and the classes they represent, nor inflict further racial or ethnic segregation or discrimination on such plaintiffs. This Court's jurisdiction or power does not extend any further than that. Concerning all other interests, parents and others must look to their elected officials.

Federal Courts may not intrude into the business of the states any further than necessary to protect federal constitutional guarantees or rights of the people and in strict compliance with the limited grants of jurisdiction and authority rendered by Congress.

In Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406 (1977), the Supreme Court of the United States held that the power of the federal courts to restructure the operation of local and state governmental entities was not"plenary" but could be exercised only on the basis of a constitutional violation, and the scope of the remedy had to be tailored to fit the nature and extent of the constitutional violation.

If there are various plans by which the constitutional violations properly can be remedied, this Court must defer to the local officials to choose which plan to use. So long as racial and ethnic discrimination is not a factor, the defendants in this case can consider and give all other factors whatever weight they deem appropriate.

Defendants are free to do many things with which the Court may not agree, but which are outside of the area of the Court's jurisdiction or authority in these cases.

Further, even within the area of the Court's jurisdiction there are limitations on the considerations relevant to this Order. We are not at this time or in this Order concerned with the proposed settlement agreement. It will be fully considered at a later hearing; one which is now scheduled for August 24, 1978. At present, the Court must rule only on the issue of whether the defendants' proposed plans for the upcoming school year sufficiently remedy the violations heretofore found to exist with respect to nine schools. What may be done next year or thereafter is not important except to the extent that present actions may prevent certain options in the future. The fact that the plans may not be complete and permanent remedies also is presently unimportant so long as the plans are substantial beginnings and good faith efforts considering the limited time before the next school year commences.

With all of the limitations on the Court in mind, the Court has determined that the plans proposed by the defendants are acceptable remedies for the constitutional violations heretofore found.

One plan treats Brichta, Manzo and Tully elementary schools, another treats Roosevelt, University Heights, Jefferson Park and Cragin elementary schools and the third treats Spring and Safford junior high schools.

With regard to Brichta, Manzo and Tully elementary schools, the defendants prefer "Option II" of the four options which they presented to the Court. Many students who are now bussed to Brichta are driven a slightly further distance to Manzo and Tully. Those students who presently walk to Brichta continue to do so. The school attendance areas for Manzo school students would remain unchanged. Although, the composition of Manzo school

students would remain heavily minority, the Court finds that the improvement is as much as would have existed at Manzo absent constitutionally objectionable School Board actions in previous years. The same is true with respect to Tully.

The objections heard by the Court from the public were that the preferred plan of defendants is inadequate to achieve real integration, that the plan is merely temporary and may lead to more than one change of school for some children when this plan must be revamped, and that other plans can better perform the functions of integration and quality education. The Court would be less than candid if it did not note that some offered alternatives have attractive qualities; however, that is not the issue here.

None of the objections presented to the Court go to the adequacy or inadequacy of "Option II" to remedy the segregative effects

found by the Court to have been caused by past intentional acts of the defendants. The Court finds that such limited effects would be adequately remedied by this plan. The defendants will comply with the Court's Order of June 5, 1978, by instituting "Option II". The plan's effect on quality of education, neighborhood cohesiveness and the children's emotions is of necessity left to the defendants' judgment.

Nothing in this Order prevents the parents and all parties to this action from seeking and/or instituting a different plan or plans in the future as long as it is also compatible with the Court's findings and conclusions.

With regard to Roosevelt, University Heights, Jefferson Park and Cragin elementary schools, the defendants submitted seven options and originally stated their preference for "Option II". As part of the proposed settlement and apparently in some compromise, the defendants endorsed

"Option III" instead. At the recent hearings, evidence to support both was introduced and the relatively small difference between them was not the subject of any objections. Their comparability and sufficiency must be considered.

Both plans call for Roosevelt and University Heights to be closed. Some Roosevelt area students would walk to Roskruge; however, most would be bussed to Cragin or Blenman. Those University Heights students living west of Euclid would be bussed to either Jefferson Park or Davidson, depending on the option put into effect. All other University Heights area students and those Jefferson Park students living west of Campbell would attend Jefferson Park. Children living east of Campbell would walk to either Blenman or Cragin. Children living north of the Rillito River would be bussed to Davidson and Whitmore instead of Jefferson Park and Cragin.

There is no doubt that both of these two plans have sufficient integrative effect to comply with the June 5, 1978, Order of the Court. Neither is there any serious question of the school closings being compatible with the Court's previous findings concerning effects or vestiges of past segregation. However, such closures are not dictated by the Court's findings or conclusions. There is no doubt however that closure of these schools and a redistribution of the students as presently contemplated, prior to the institution of these lawsuits would have been a positive factor in favor of defendants. The plaintiffs justifiably complained of the retention of these schools, notwithstanding the fact that it was done at least in part, if not in whole, to accommodate members of the plaintiffs' classes. The only question before this Court with respect to these plans is whether they may place an undue

burden on the minority students they are meant to benefit. The Court expressed doubts and some misgiving about this. Those doubts and misgivings have been dispelled by a careful analysis by the Court of the legal principles involved, the objections and the plans; particularly in view of the longer range possibilities such plans afford.

At the recent hearings it was made clear to the Court by parents that they indeed have affection and concern for their schools, think highly of the present teachers and programs, and do not feel that they live in "dying" or decaying neighborhoods. They present evidence calling the reasons for closure into question, and they request more time to find more evidence and to present better alternatives.

If Roosevelt stays open it will have 178 students from its present area in attendance, and 97 students from 8 miles

away. There are 5 crossing guards for children attending Roosevelt -- more than for any other school. This is because the children must cross Stone, Drachman (Interstate 210, the commercial route of Interstate 10), Speedway, Sixth Avenue and Main Avenue in order to reach Roosevelt. The defendants are free to consider such factors and to consider the potential harm to students and potential legal liability on the District. The school itself is in an area which is immediately surrounded by Pima Community College, motels, business operations and "adult" entertainment with little residential use. This is true to a lesser extent of the larger area which has had its student population reduced from a high of 349 students to the present 178. The potential for a "revitalized" family type neighborhood for the Roosevelt area appears slim indeed.

The school is old and would need extensive improvements for continued and

expanded use. There was evidence that the school district can probably sell the building for a substantial sum, and could save operating expenses by closing the school and having fewer under utilized schools to operate. The school board certainly has the authority and perhaps a duty to close the school unless the impact on minorities is discriminatory. The fact that there are other under utilized schools within the District is not relevant to the issue presently before the Court.

The Roosevelt area children who will walk to Roskruge are not adversely affected. The children who will go to Cragin and Blenman will have to be bussed 4 miles; however, they will attend larger, more updated schools with more educational programs available, and they will attend better integrated schools. The Court cannot say in light of all the factors here

involved that it is racially discriminatory to compel one group of children to ride a bus 4 miles in order to prevent another group from needing to ride 8 miles. Moreover, the Court is informed that a new school closer to Roosevelt than Jefferson Park is to be seriously considered for the future, and the Court can hereafter order detailed consideration if it becomes necessary within the scope of the issues involved in these cases. Parents surely will have an opportunity to participate and to express themselves in such consideration.

Roosevelt does not have to be closed as far as the Court is concerned, but under the circumstances the Court will not prevent it, and it appears doubtful that the Court has a legitimate option to do so.

As found by the Court on June 5, 1978, the defendants appropriately ordered the closure of University Heights near the commencement of these actions. Because of

the instant actions, the District stayed the closure order. Now the defendants want to exercise their authority and carry through their initial determination which adds most of the University Heights area to Jefferson Park. Since all children living east of Euclid are within walking distance of Jefferson Park, the Court does not find that any minority students are discriminated against by such. In "Option II" the children west of Euclid are barely out of walking distance to Jefferson Park and are provided transportation to school. Certainly the 4th, 5th and 6th grade students who participate in after-school adtivities can adequately walk or ride bicycles home west of Euclid. "Option II" must be approved.

In "Option III" those students west of Euclid will be bussed to Davidson, and there may be some disruption of parental involvement and after school activity. The

Court must consider whether this inconvenience shows an undue burden on minority students when the reasons for closure of University Heights are considered. While there is dispute over the estimated costs of roof repair, there appears no dispute that substantial repars must be undertaken on the roof of University Heights if it remains open. Some clasrooms are too small according to modern standards and the site is inadequate. The University of Arizona is expanding into the eastern portion of the school's attendance area north of Speedway; there are parking lots, the law school, the medical school, and most likely more of the school's attendance area will be absorbed by the University. Apartments in the area are generally to accommodate University students with no children, even though some graduate students do have school age children.

The Court realizes that the people

want to maintain the present status of their schools despite these problems and further considers that the area may possibly improve and gain a few families with elementary age children in the future; however, the decision to close University Heights is not irrational, or motivated by racial or other unconstitutional considerations, nor is it so burdensome on minority students that this Court can legitimately prevent it. For this Court to be persuaded to exercise its power so as to thwart the closure of either Roosevelt or University Heights would be to usurp the authority and function of the District officials by considering matters beyond the scope of the issues involved in these cases.

In regard to junior high schools, the defendants propose to close Spring, send its students mostly to Maxwell, partly to Safford and partly to Mansfeld.

Although Safford and Mansfeld students and parents object to language in the plan and the proposed settlement agreement which suggests that Safford and Mansfeld be closed in the future, no real objection was voiced to the plan as it will operate in the coming school year. Future closure, it appears, can and must be studied by all concerned over the next few years. Again, however, and with respect to the objections or concerns expressed to the Court about possible closure of Safford and Mansfeld, the previous remarks of the Court about its limitations are appropriate.

Spring parents object to losing their neighborhood junior high school; however, all children will live within approximately four miles of their new junior high, and this distance is not at all excessive when compared to other children around the district. The receiving junior highs will have much better racial balances and will

have more students, which allows a broader range of programs. The Court finds no detriment to the plaintiffs' classes sufficient to warrant preventing the defendants' "Option V" from being adopted.

Some of the arguments regarding the benefits of keeping Spring as a minority dominated haven for parents who want such a school cannot be taken into account consistently with the Constitution of the United States or the issues decided by this Court.

IT IS ORDERED that the options preferred by defendants are approved as being in compliance with this Court's Order of June 5, 1978, for operation in the 1978-1979 academic year.

IT IS FURTHER ORDERED that all parties shall study the operation of these plans of desegregation, formulate additional plans for future years, and shall without undue delay recommend preferred plans for

future implementation. A report shall be made to the Court by all parties hereto of the operation of the approved plans as soon as possible following the end of the first term of the 1978-79 school year. Such report shall contain, but not be limited to, such matters as minority student acceptance and progress, successes and/or failures or problems resulting from the plans and any parental matters resulting from such plans.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Order to all counsel of record herein.

DATED this 11th day of August, 1978.

/s/
William C. Frey
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER DENYING CERTIFICATION OF A SUBCLASS
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: August 11, 1978

W. J. FURSTENAU, CLERK
U.S. DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

BY /s/
DEPUTY CLERK

Plaintiff Sanchez has filed a motion to create a sub-class "consisting of all Mexican-American or Hispano-American students or students with Spanish surnames within grades K through 8 in Tucson School District Number One and the parents, guardians and/or next friends of those students, who now attend or will in the future attend a school subject to or proposed to be, immediately or in the near future, closed by order of this Court or proposed settlement of the parties". Originally, a class of all Mexican-American students who attended school in the district and their parents was created, and plaintiff Sanchez was certified as one of the representatives of the class.

Once a decision was rendered concerning the liability of the district, settlement negotiations were commenced and eventually led to the point that the closure of some minority dominated schools became probable. At that point, a difference of opinion arose between plaintiff Sanchez and other named plaintiffs, and he sought and was allowed separate counsel for himself. He also sought to represent a sub-class. Hearings were held and memoranda were filed.

A review of the pleadings and testimony shows that the views of plaintiff Sanchez and those of the overall class of plaintiffs are divergent only insofar as the proposed remedial plan is concerned. His objections can be summarized as follows. Closure of Roosevelt, University Heights and Spring places the burden of desegregation unevenly upon the Mexican-American sub-class proposed. Closure also promotes

or maintains segregated residential patterns and segregated schools. Other plaintiffs would likely assert the same positions if it were not for the proposed settlement.

There are at least two sufficient reasons for denying plaintiff a sub-class. First, plaintiff Sanchez and many other proposed sub-class members have already objected to the defendants' plans for closure, and the matter has now been decided against them. This is not merely a preliminary examination of the merits, but a full ruling on the merit of their position. It would be a futile act to now create a sub-class of such objectors.

Secondly, the other plaintiffs have only agreed to these closures as part of an overall settlement. Concessions of viable issues are necessarily made in settlements and Title 28, United States Code, Federal Rules of Civil Procedure 23(e) ade-

quately provides for class members who object to certain concessions. There will be a hearing on the proposed settlement at which all class members will have an opportunity to be heard.

If the proposed settlement is approved, plaintiff Sanchez can appeal the approval and this Order. If it is not approved and if it appears that there are real legal conflicts among the class, a further motion for sub-class certification could be filed.

It further appears that the proposed sub-class is too vague to be a meaningful class and to assume that there are common issues of fact and law applicable to such a proposed class different from those of the class in general, assumes too much.

An additional defect in the motion is that there is no showing that the other plaintiffs and their attorneys do not adequately represent the interests of the whole class, including the proposed sub-

class.

The evidence presented by plaintiff Sanchez fails to show any real conflict or antagonism to the interests of the proposed sub-class, merely differences of opinions with some of the proposed sub-class as to the remedy this Court should adopt. If dissatisfaction of a class member, or group of such members, with actions taken on their behalf could rise to the status of a conflict of interest, there would be few class actions without a multitude of sub-classes. Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832 at 835 (9th Cir. 1976) cited by plaintiff Sanchez seems to recognize this and is of no aid to him. That case appears also to recognize that there will be dissident class members with respect to a settlement and that their interest can be adequately protected without the creation of a sub-class even where they have separate counsel.

IT IS ORDERED that the motion of plaintiff Sanchez to create a sub-class is denied.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Order to all counsel of record herein.

DATED this 11th day of August, 1978.

/s/
William C. Frey
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER APPROVING NOTICE OF PROPOSED SETTLEMENT
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: August 14, 1978

A proposed settlement has been filed in these consolidated actions. Pursuant to Title 28, United States Code, Federal Rule of Civil Procedure 23(e) it is necessary to give notice to the members of the plaintiff classes of the proposed settlement and of their right to object.

Plaintiff Sanchez has objected to the form of the notice because it does not contain what he considers to be a sufficiently detailed explanation of the options mentioned therein. He also objects to the short period of time allowed between dissemination of the notice and the hearing on objections to the proposed settlement.

Because of the great amount of local publicity concerning all prior orders and proceedings in this case, it appears that the form of notice is sufficient. For the same reason, and because school will commence in three weeks, the Court also feels that

the time allowed for objections is sufficient.

IT IS ORDERED that:

1. The attached form of notice in English is approved for signature by a Clerk of this Court. A Spanish translation of such notice shall be prepared and agreed upon by counsel for the Mexican-American class of plaintiffs and defendant Tucson United School District No. 1; same shall be submitted to the Clerk of this Court for signature no later than 10:00 A.M., Wednesday, August 16, 1978.

2. Said notice both in English and Spanish shall be published by Defendant Tucson Unified School District No. 1, in a newspaper or newspapers of general circulation in Tucson, Arizona, on five (5) different days commencing as soon as possible after 10:00 A.M., Wednesday, August 16, 1978, and ending on

or before August 28, 1978.

3. The parties and their counsel shall cooperate and use their best efforts in disseminating the notice by other means so as to reach as many members of the plaintiff classes as is reasonably possible.

4. The costs of translation of the notice shall be billed to the Clerk of this Court.

5. Objections to the proposed settlement shall be heard in Court on Wednesday, August 30, 1978, commencing at 8:30 A.M.

6. Counsel for all parties to the proposed settlement agreement herein shall make a written report to the Court by 8:30 A.M., Wednesday, August 30, 1978, of the effort made to disseminate the notice to the class members.

IT IS FURTHER ORDERED that the

Clerk of this Court forthwith notify all counsel of record herein by telephone of the entry of this Order and mail a copy of this Order to all counsel of record herein.

DATED this 14th day of August, 1978.

s/William C. Frey
William C. Frey
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: August 22, 1978

IT IS ORDERED:

The Motion of plaintiff Sanchez for Discovery is denied as to Item 1 contained in his motion. The issue as to the desegregation plan adopted by the Court is now moot by virtue of the Court's Order of August 11, 1978.

The said Motion for Discovery is granted as to Items 2, 3, 4, and 5. Plaintiff Sanchez shall forthwith proceed with reasonable interrogatories, depositions and requests for production and/or admissions.

Any objections to any discovery attempted by plaintiff Sanchez will be heard immediately upon the filing thereof.

IT IS FURTHER ORDERED that the Clerk forthwith notify counsel for all parties of this Order by telephone and thereafter either furnish copies of this Order or mail same to such counsel.

DATED this 22nd day of Autust, 1978.

s/William C. Frey
William C. Frey
United States District Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SUTTON, et al, Defendants-Intervenors.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER APPROVING SETTLEMENT
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NO. 1, et al, Defendants.	

FILED: August 31, 1978

W. J. FURSTENAU, CLERK
DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

BY /s/
DISTRICT CLERK

These cases proceeded to trial and the Court made and entered substantial findings of fact and conclusions of law. Thereafter counsel for plaintiffs filed objections and motions pertaining to such findings and conclusions but stipulated that a ruling on such matters be deferred by the Court to allow counsel an opportunity to explore the possibility of a settlement.

Counsel entered into a proposed settlement subject to class hearings and Court approval. The proposed settlement included approval by plaintiffs of a desegregation plan submitted to the Court by defendants pursuant to Court Order and designed to

remedy existing effects of past discriminatory acts or policies.

The Court conducted public hearings to receive evidence from those affected by such desegregation plan. Some of the plaintiff class members appeared and testified in opposition to such plan. The opposition by class members to the desegregation plan came from those opposed to the closing of three schools (Roosevelt Elementary, University Heights Elementary and Spring Jr. High). The Court found the desegregation plan approved by the parties to be fair, equitable, curative of the existing effects from past discrimination and constitutionally proper.

Once the parties had arrived at a tentative settlement, one of the plaintiffs in Case No. 74-204 (Sanchez) apparently became dissatisfied with the proposed desegregation plan and sought separate counsel. Such substitution of counsel was accom-

plished and new counsel for plaintiff Sanchez initiated objections to the proposed settlement and the proposed desegregation plan.

The Court directed notice of the proposed settlement and scheduled a hearing thereon. The hearing produced, for the most part, response from the same dissenters and objectors to the desegregation plan. Essentially, the argument in opposition to the proposed settlement involved dissatisfaction with school closures and student assignment. More specifically such dissatisfaction centered on the closing of Roosevelt Elementary and Spring Jr. High. Beyond this, the hearings produced little by way of objection to the proposed settlement. A few of the objectors apparently went door to door with a petition listing objections to the proposed settlement, none of which went to the fairness of the settlement and most of which were irrelevant.

About 90 signatures were so collected. However, the evidence fails to show that those signatures represent bona fide members of the class or what inducement, if any, caused the signatures.

Eleven class members appeared and testified in opposition to the settlement and as previously stated, many if not most, of those were those who previously objected to the desegregation plan and, in general, they simply restated the same objections previously made to the Court. In addition to such objectors noted above, the Court received six letters opposed to the proposed settlement. Further, counsel for plaintiff Sanchez submitted pleadings indicating he was representing 21 objectors. Approximately seven or eight of such appeared and testified.

Without determining the validity of the alleged class standing of those sending letters and signing the petition, the ob-

jectors, including in some instances husband and wife, totalled 121; the two classes involved in these cases total 18,500 students.

Much time was consumed at the public hearing by the objectors' evidence concerning the pilot program on the "Spaulding Method" for language arts instruction. Not only did the evidence fail to show that the inclusion of such a pilot program was unfair or discriminatory, it failed to take into account that the program was strictly a volunteer program limited to 30 students. Counsel for plaintiffs in Case No. CIV 74-204 has filed a comprehensive memorandum on this issue which adequately covers the propriety of the inclusion of such a program in the settlement agreement. This is adopted by the Court.

The objectors and counsel for plaintiff Sanchez make such of the inadequacy of the scope and form of the notice, yet their

testimony reveals widespread actual notice. No doubt given more time and more opportunity, the hard core of objectors could have marshalled more numbers of objectors, but the evidence fails to reveal that such objectors would have had objections different in kind from what was received and considered. The notice in this case was fair and adequate as is shown by the record.

These cases were fully tried on their merit in a vigorous adversary proceeding. Most, if not all, of the objections, other than those going to the Court's remedy, i.e., closure of schools and student assignment, involved issues that were tried and ruled upon. The objections received in this case simply were not meritorious.

The standard to be applied by the Court in reviewing a proposed settlement of a class action is whether the proposed settlement "is fair and reasonable". Bryan v. Pittsburg Plate Glass Company, 494 F.2d

799, 801 (3rd Cir. 1974), cert. denied, 419 U.S. 900 (1975). Accord, Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977); In re King Resources Company Securities Litigation, 420 F. Supp. 610, 625 (D. Colo. 1976); Lewis v. Newman, 59 F.R.D. 525, 527-28 (S.D.N.Y. 1973); West Virginia v. Charles Pfizer and Company, 314 F. Supp. 710, 740 (S.D.N.Y. 1970), affirmed, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971). As the Court stated in Lewis v. Newman, supra:

> "The test is often more concisely phrased--is the settlement 'fair, reasonable, and adequate.'" 59 F.R.D. at 527-28.

The determination whether a proposed settlement of a class action is fair, reasonable and adequate is committed to the sound discretion of the trial court. Grunin v. International House of Pancakes,

513 F.2d 114, 123 (8th Cir. 1975); Newman v. Stein, 464 F.2d 689, 692 (2d Cir. 1972); Ace Heating and Plumbing Company v. Crane Company, 453 F.2d 30, 34 (3rd Cir. 1971).

The principal factors to be considered by the district court in determining whether to approve a proposed settlement of a class action were listed by the Second Circuit in City of Detroit v. Grinnell Corporation, 495 F.2d 448, 463 (2d Cir. 1974). To the extent applicable to a case such as this, those factors are as follows: (1) The relative strengths and weaknesses of plaintiffs' legal position; (2) the risks of establishing liability; (3) the complexity, expense and likely duration of the litigation; (4) the state of the proceedings and the amount of discovery completed; (5) the ability of the defendants to withstand a greater judgment; (6) the reaction of the class to the settlement; (7) the range of reasonableness of the

settlement terms in light of the best possible result. See also, Bryan v. Pittsburg Plate Glass Company, supra, 494 F.2d 799 (erd Cir. 1974), cert. denied, 419 U.S. 900 (1974). Unquestionably, the most significant factor is the strength of the plaintiffs' case. See Marshall v. Holiday Magic, Inc., supra, 550 F.2d 1173, 1178 (9th Cir. 1977). As the Supreme Court has stated in an analogous context, the court should "compare the terms of the compromise with the likely rewards of further litigation" in assessing the fairness, reasonableness and adequacy of a proposed settlement. Protective Committee for Independent Stockholders of TMT v. Anderson, 390 U.S. 414, 425 (1968).

Another factor (not listed in Grinnell) is whether the proposed settlement is advocated by a government agency. If so, the courts generally give this factor great weight in assessing the fairness

and adequacy of the settlement. Marshall v. Holiday Magic, Inc., supra, 550 F.2d 1173, 1178 (9th Cir. 1977). In this case the government intervened on behalf of the plaintiffs and is urging the adoption of the settlement agreement.

Considering all of these factors in light of the facts and circumstances and present posture of these cases, it is clear that the proposed settlement is fair, reasonable and adequate to all members of each class.

IT IS ORDERED:

1. That the Stipulation of Settlement filed herein, a copy of which is attached hereto (as amended on page 6, paragraph 13) is approved, merged herein and shall be the controlling Order of the Court, notwithstanding any prior Orders or Findings entered herein, as provided in paragraph 23 of the said Stipulation of Settlement.

2. That all pending motions filed herein to alter or amend the Court's Findings of Fact and Conclusions of Law, are denied as moot.

The Clerk is directed to mail a copy of this Order to all counsel of record herein.

DATED this 31st day of August, 1978.

/s/
William C. Frey
United States District Judge

APPENDIX J

J. Wm. Brammer, Jr.
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DeCONCINI McDONALD BRAMMER YETWIN
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Attorneys for Defendants other
than Defendant Lohr

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ROY and JOSIE FISHER, et al,	)
Plaintiffs,	)
UNITED STATES OF AMERICA,	)
Plaintiff-Intervenor,	)
vs.	)
ANITA LOHR, et al,	)
Defendants.	)
and	)
SIDNEY L. SUTTON, et al,	)
Intervenors-Defendants.	)

MARIA MENDOZA, et al,	)
	)
Plaintiffs,	)Nos.
	)
UNITED STATES OF AMERICA,	)CIV-74-90-TUC-WCF
	)
Plaintiff-Intervenor,	)CIV-74-204-TUC-WCF
	)
	)
vs.	)
	)STIPULATION OF
TUCSON SCHOOL DISTRICT NO. 1, et al,	)SETTLEMENT
	)
	)
Defendants.	)
	)

FILED: August 11, 1978

W. J. FURSTENAU, CLERK
U.S. DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

BY /s/
DEPUTY CLERK

On June 15, 1978, Plaintiffs Fisher, et al., and Plaintiffs Mendoza, et al., filed motions to Alter or Amend Findings of Fact and Conclusions of Law entered by the Court on June 5, 1978, in these consolidated school desegregation cases. Plaintiff-Intervenor United States sup-

ported the motions which were filed by Plaintiffs. Those motions were argued before the Court on June 28, 1978, and are presently pending.

Subsequent to the hearing on Plaintiffs' motions, counsel for all parties have conferred and agreed to the terms of a final settlement of this case, as contained in this stipulation, that will make it unnecessary for the Court to decide the pending motions and that will finally resolve this litigation. As evidenced by the signatures of their counsel below, the parties hereby stipulate and agree as follows:

1. The parties file herewith a joint motion requesting the Court to enter the attached Settlement Order, which has been signed by all parties who have appeared in this action.

2. Commencing with the 1978-79 school year and thereafter during the term of this

agreement, the Defendants will operate Brichta, Tully, and Manzo elementary schools in accordance with Option II of the plans submitted to the Court on July 17, 1978, and will operate Roosevelt, University Heights, Cragin, and Jefferson Park elementary schools in accordance with Option III of the plans submitted to the Court on July 17, 1978, as originally recommended by the District staff, unless alterations are made or approved as provided herein in paragraphs 20, 21 or 23.

3. Commencing with the 1978-79 school year and thereafter during the term of this agreement, the Defendants will operate their junior high schools in accordance with Option V of the plans submitted to the Court on July 17, 1978, provided that the closure of Mansfeld and Safford Junior High Schools and the construction of a new school to replace them is undertaken as soon as practicable, unless alterations

are made or approved as provided herein in paragraphs 20, 21 or 23. In the event construction of the new junior high school is not completed within a reasonable period of time, the Board will implement alternative measures to desegregate Safford Junior High School.

4. Commencing with the 1979-80 school year and thereafter during the term of this agreement, the Defendants shall alter the student assignment patterns for Borton and Holladay Elementary Schools under a plan of student assignment which will be developed in the manner described in paragraph 8 below, so as to reduce the minority enrollment of these schools below approximately 50 percent minority.

5. Commencing immediately, the Defendants shall implement a process for parent participation to examine the future student assignment patterns for Davis, Drachman, and Carrillo Elementary Schools.

The public process shall consider whether these schools should be closed, consolidated, or continued and make recommendations to Defendants on the educational specifications for either the continuation of the schools or the contruction of a new elementary school(s) in the inner city, if such is to be the case.

6. Commencing with the 1979-80 school year and thereafter during the term of this agreement, the Defendants shall alter the student assignment patterns for Utterback Junior High School under a plan of student assignment which will be developed in the manner described in paragraph 8 below, so as to reduce the minority enrollment at that school below approximately 50 percent.

7. Commencing with the 1979-80 school year and thereafter during the term of this agreement, the Defendants will ensure that the junior high school into which

the graduates of Pueblo Gardens and Cavett Elementary Schools matriculate shall not exceed approximately 50 percent minority student enrollment, under a plan to be developed in the manner described in paragraph 8 below.

8. The student assignment plans required by paragraphs 4, 5, 6 and 7 above shall be developed under the following procedure and schedule:

(a) The Defendants will immediately implement a process or processes for public participation, which will include representatives of those to be affected, in the development of alterations of student assignments for the schools indicated.

(b) The plans for student assignment, if any, developed through the above public process or processes shall be reviewed by the Defendants and shall be provided to counsel for Plaintiffs and Plaintiff-Intervenor for a reasonable

period of review of not less than ten (10) days and the parties to this Stipulation shall determine by November 30, 1978, whether the plans so developed are acceptable to them;

(c) If the Defendants, the Plaintiffs or the Plaintiff-Intervenor find the plans developed through the above public process unsatisfactory, the Defendants shall independently examine the issues and produce a plan for alteration of student assignments as provided in paragraphs 4, 5, 6 and 7 above, for presentation to the Court and to Plaintiffs and Plaintiff-Intervenor on or before December 31, 1978;

(d) The parties shall confer and on or about the 31st of January, 1979, shall inform the Court whether they have been able to agree on the plan, or a modification of the plan, presented pursuant to subparagraph 8(c) above;

(e) If the parties have agreed, the student assignment adjustments shall be incorporated into a Stipulation of Settlement No. 2 which will be jointly submitted to the Court for its approval in the form of an order containing the same terms as paragraph 1 of the Settlement Order filed herewith;

(f) If the parties cannot agree, the issues will be submitted to the Court for resolution consistent with the terms of this Stipulation.

9. The Defendants shall restructure the assignment of faculty at Pueblo Gardens and Cavett Elementary Schools so that a disproportionate number of Black teachers, taking the District as a whole, is not on the faculty of either school. Implementation of such reassignments shall be completed no later than the commencement of the fall semester of the 1979-80 school year.

10. In addition to the reassignment of Black teachers outlined in paragraph 9 above, the Defendants shall examine the assignment of all Black teachers during the 1978-79 school year. Necessary reassignments shall be implemented so that a disproportionate number of Black teachers, taking the District as a whole, is not on the faculty of any given school commencing with the fall semester of the 1979-80 school year.

11. The Defendants shall adopt an additional statement of Non-Discrimination in Employment and establish uniform procedures with respect to the hiring, placement, and promotion of District employees, in the form of the statement which is attached hereto as Exhibit "A".

12. The Defendants will develop and implement in-service training programs which will be required of all District employees involved in implementing this

agreement and the student assignment plans adopted pursuant to paragraphs 2 through 7 above.

13. The Defendants shall implement good faith efforts, with specific input and recommendations from Black and Mexican-American parents, to ensure that no student is discriminated against in the implementation of the District's uniform suspension and expulsion policy.

14. The Defendants shall conduct a careful, good faith examination of the testing instruments used by the Defendants to ensure that no student is discriminated against in this aspect of the District's educational program. The Defendants' efforts shall include the utilization of qualified personnel to assess tests and responses that are unique to Black students. In addition, qualified parents, or their qualified representatives, and Black edu-

cators shall assist the Defendants as they complete the design and implementation of the "Programmatic Recommendations to assist in the Quality Education of Black Students in Tucson," a document previously submitted by Plaintiffs Fisher.

15. The Defendants shall not admit a student to a bilingual instructional program without specific parental permission. No student shall be admitted to such a program without an explanation of the nature of the program and the available options, including programs of standard English as a second dialect (e.g., B.A.S.E.), to the student's parent(s). As a part of the Defendants' efforts to evaluate the bilingual instructional programs, there shall be included external evaluation of these programs to determine whether there have been adverse effects on non-program students, with the objective of correcting any such effects.

16. Commencing with the fall semester of the 1978-79 school year, the Defendants shall offer a one-year pilot instructional program utilizing the "Spalding Method," provided that at least 25 students shall signify interest in such a program in writing, by August 14, 1978, including an acknowledgment that they have been advised of the Defendants' view of the "Spalding Method." Enrollment in the pilot program shall be limited to 30 students.

(a) The pilot program shall be at Menlo Park School. Children enrolled in that program who otherwise would qualify for transportation on a daily basis and who desire it shall be provided transportation by Defendants.

(b) Commencing immediately, the Defendants will implement a process to select a teacher to instruct the pilot instructional program. At a very minimum,

the person selected to instruct this program should have (1) experience in teaching the "Spalding Method;" (2) experience in having taught that method to Mexican-American children; and (3) demonstrated past success in teaching Mexican-American children through the "Spalding Method."

17. On April 15, 1979, October 15, 1979, April 15, 1980 and for each April 15 thereafter during the term of this stipulation, the Defendants shall file with the Court and serve on each party a report showing the racial and ethnic student enrollment of all schools involved in the above plans to that date; the faculty and staff of each school together with any reassignments of faculty and staff and any reasons therefor; and a report showing all programmatic changes pursuant to this stipulation and the effectiveness of such changes. In addition, during the term of this stipulation, counsel for Plaintiffs

and Plaintiff-Intervenor shall have reasonable access to Defendants' records for these purposes.

18. An independent citizens' committee will be established by the Defendants to review and report to the School Board the progress of the Defendants' compliance with the terms of this stipulation. This "citizens'" committee will include one member selected by the Plaintiffs Fisher, et al., and one member selected by the Plaintiffs Mendoaz, et al. In addition, the Board shall select citizens of diverse ethnic and racial backgrounds, including but not limited to Mexican-Americans, Blacks, Anglos, Orientals and Native Americans.

19. Defendants will not engage in any acts or policies which deprive any student of equal protection of the law whether by intentional segregation or discrimination based on a student's race or ethnic group.

20. Defendants will not undertake the construction of new schools or of permanent additions at existing schools without specific authorization of the Court. Nothing in this stipulation shall preclude the construction of new schools in the future if the construction of such schools is deemed to be in the best interest of the community and not inconsistent with on-going efforts to reduce segregation, nor shall anything herein preclude revision of student transportation patterns for the purpose of having the effect of reducing or eliminating the transportation of students called for in this stipulation, consistent with on-going efforts to reduce segregation.

21. Hereafter, and until further order of the Court, all acts and/or policies of the District which substantially affect the racial or ethnic balance in any school in the District and/or which are

discriminatory because based on race or ethnicity of any students in the District schools, shall be subject to Court review in these cases.

22. After five full school years of operation under the terms of this agreement and the student assignment plans adopted pursuant to this stipulation, the Defendants may on or after July 1, 1983, move the Court to dissolve the Settlement Order and dismiss these actions, with prejudice, unless the Plaintiffs or the Plaintiff-Intervenor, within at least thirty (30) days after service of such motion, object to the dissolution of the Settlement Order and the dismissal of these actions on the grounds that the Defendants have failed to comply with the terms of this agreement, or other applicable orders entered by the Court herein. If such an objection is filed, the Court shall set a hearing as soon thereafter as

possible to determine the appropriate disposition of this action.

23. Once this Stipulation of Settlement becomes effective, the rights and obligations of the parties shall be determined solely by its terms and the terms of any subsequent stipulations or orders entered herein pursuant to it. Assuming that the expectations for student enrollments set out in the plans approved by the Court pursuant to this Stipulation are substantially met through the 1979-80 school year, the plan will be deemed to have been implemented insofar as student assignments are concerned in accordance with this Stipulation. Plaintiffs, Plaintiff-Intervenor and Defendants shall retain all rights and remedies provided by law or equity and the federal rules of procedure in seeking enforcement or relief from this and any subsequent stipulations and orders, including the right to seek

review of any order enforcing or refusing to enforce such stipulations. Further, in seeking enforcement of or relief in any federal court from the time of this stipulation, no party may rely upon prior findings and conclusions in this case to interpret the terms of this stipulation or to determine the rights and obligations of the parties thereunder.

24. This stipulation shall become effective upon the Court's entry of the Settlement Order filed herewith and the Court's approval of the Stipulation of Dismissal, concerning Counts 2, 3, 4, 5, 6 and 7 of the Amended Complaint filed on behalf of Plaintiffs Mendoza, et al. If the Court fails to enter the Settlement Order and Order approving the Stipulation of Dismissal, this stipulation becomes void ab initio.

25. Any order entered in conjunction

with paragraph 22 above, shall be considered as fully and finally terminating these cases, and resolving any and all disputes between the parties, including all class members, in the above captioned causes.

26. Defendants shall pay to counsel for all Plaintiffs as and for all their attorneys' fees and costs, both past and future, except to the extent of any attorneys' fees and costs incurred by Plaintiffs in the future as a result of Defendants' failure to comply with the terms and conditions agreed to herein, the aggregate sum of Five Hundred Thousand Dollars ($500,000.00), to be payable in two (2) installments, and to be divided among Plaintiffs' counsel as they may see fit. The two installment payments are to be made as follows and are conditioned upon counsel for Defendants being first provided by counsel for Plaintiffs with spe-

cific documentation in the form of time and expense records and vouchers which, in the reasonable opinion of Defendants' counsel, support such payment:

(a) The first installment shall be Two Hundred Fifty Thousand Dollars ($250,000.00), payable as soon as is reasonably possible after the Court's approval and entry of both the Settlement Order filed herewith and Order approving the Stipulation of Dismissal;

(b) The second installment shall be Two Hundred Fifty Tousand Dollars ($250,000.00), payable as soon as is reasonably possible after the entry of the Court's Order which is contemplated by paragraph 8(e) or 8(f) above, further providing that this second installment shall not be paid prior to July 10, 1979.

27. Anita Lohr may be dismissed as a Defendant in these actions.

Stipulated and agreed to this 8th day of August, 1978.

/s/
Rubin Salter, Jr.
Attorney for Plaintiffs
Fisher, et al.

Stipulated and agreed to this 8th day of August, 1978.

/s/
William J. Maledon
Attorney for Plaintiffs
Fisher, et al.

Stipulated and agreed to this 8th day of August, 1978.

/s/
Michael O. Zavala
Attorney for Plaintiffs
Mendoza, et al.

Stipulated and agreed to this 8th day of August, 1978.

/s/
Morris J. Baller
Attorney for Plaintiffs
Mendoza, et al.

Stipulated and agreed to this 11th day of August, 1978.

/s/
J. Wm. Brammer, Jr.
Attorney for Defendants other than Defendant Lohr

Stipulated and agreed to this 8th day of August, 1978.

/s/
John R. Moore
Thomas M. Keeling
Louie M. Stewart
Attorneys for Plaintiff-Intervenor United States of America

NON-DISCRIMINATION IN
EMPLOYMENT STATEMENT

It shall be the policy of Tucson Unified School District to adhere to all state and federal constitutional and statutory racially non-discriminatory criteria regarding the recruitment, hiring, assignment, promotion, demotion, and dismissal of any certified and classified staff.

The Superintendent of Tucson Unified School District shall develop procedures which shall insure that its schools are not racially indentifiable solely as a result of its faculty and staff assignments.

The Tucson Unifoed School District, its Board, and administration shall follow those policies and procedures so as to prevent the creation of identification of schools by reference to disproportionate

EXHIBIT "A"

racial composition of the faculty and staff, bearing in mind, however, that the test is a balance of faculty and staff by qualifications for subject and grade level and then by experience and race.

The Board will regularly review its hiring and promotion policies in Tucson Unified School District so as to ensure the absence of any discrimination or inequities.

Consistent with the General Provisions stated above, the Tucson Unified School District Board of Education directs the Superintendent as follows:

a) To promote the consistent implementation of this policy at all local levels, the Superintendent or his single, specific deisgnee, shall be personally responsible for directing all of the personnel activities within the district.

b) All recruitment and promotional requirements must be reviewed for the purpose of assuring that such requirements cannot purposely or inadvertantly discriminate against any class of individuals.

c) Uniform recruitment evaluation devices or tests shall be used.

d) A uniform grievance and hearing procedure shall be available to individuals who allege to have been discriminated against, due to race, color, sex, national origin, religion or age.

e) Uniform procedures shall be established to assure equal promotional opportunities for all qualified employees regardless of race, color, sex, national origin, religion, or age.

7/12/78

APPENDIX K

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 78-3352

MARIA MENDOZA, ETC., ET AL.,

Plaintiffs-Appellees,

and

ALBERTO SANCHEZ, NADINE SANCHEZ, BETTY SANCHEZ, GEORGE SANCHEZ, ERNEST SANCHEZ AND JOHN SANCHEZ,

Plaintiffs-Appellants

and

JULIA O. FLOREZ, BILLIE GUTIERREZ, THERESA MEDINA, BETTY M. GRANILLO, CAROL CRUZ-POPKIN, BARNEY PAUL POPKIN, CARMEN P. URRUTIA, MANUEL ALVARADO, CAROLYN HACKWORTH, GLORIA HAGLER, JOHNNY RANDOLPH-KELLY, THELMA B. MANRIQUEZ, ADOLFO A. SUAREZ, NAT WASHINGTON, II, RALPH O. GOMEZ, JUAN BRITO, MARCIA ALMEDA, EMILIA TALAMANTEZ, ELLEN LEE, ESPERANZA SILVA, ANTONETTE ROMO, RONALD Q. HUERTA AND LUPE MONTANO,

Plaintiffs-Objectors-Appellants,

v.

UNITED STATES OF AMERICA,

Plaintiff, Intervenor-Appellee,

TUCSON UNIFIED SCHOOL DISTRICT NO. 1, ET AL.,

Defendants-Appellees,

ORDER

FILED: AUGUST 11, 1980

Before: CHOY and SNEED, Circuit Judges and EAST,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing enbanc and no judge of the court has voted to grant rehearingen banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX L

OFFICE OF THE CLERK

UNITED STATES DISTRICT COURT

55 EAST BROADWAY

TUCSON, ARIZONA

NOTICE OF PROPOSED SETTLEMENT

OF SCHOOL DESEGREGATION CASES

AND OF HEARING THEREON

TO: THE PARTIES, GUARDIANS AND/OR NEXT FRIENDS OF ALL BLACK STUDENTS WHO ARE ENROLLED OR ARE TO BE ENROLLED IN GRADES K THROUGH 8 IN TUCSON UNIFIED SCHOOL DISTRICT NO. 1; AND, THE PARENTS, GUARDIANS, AND/OR NEXT FRIENDS OF ALL MEXICAN-AMERICAN OR HISPANO-AMERICAN STUDENTS OR STUDENTS WITH SPANISH SURNAMES WHO ARE ENROLLED OR ARE TO BE ENROLLED IN GRADES K THROUGH 12 IN TUCSON UNIFIED SCHOOL DISTRICT NO. 1:

There are pending in the United States District Court for the District of Arizona, in Tucson, Arizona, two class actions (No. CIV 74-90 and No. CIV 74-204) charging

Tucson Unified School District No. 1, its Board of Education, its Superintendent, and certain other Defendants with violating the United States Constitution and various statutes by (in the case of Black children) racially segregating and discriminating against Black children in elementary and junior high schools, and by (in the case of Mexican-American children) racially segregating and discriminating against Mexican-American children and employees in elementary, junior high schools and high schools. These class actions were commenced in 1974 by parents of Black and Mexican-American school children in Tucson ("Plaintiffs"). The United States of America, through the United States Justice Department, was subsequently permitted to intervene as a Plaintiff. The evidence in these actions was presented to the Court between January and April of 1977, and a decision was rendered by the Court on June

5, 1978. The Court's decision, accompanied by extensive Findings of Fact and Conclusions of Law, requires the Defendants to implement by the start of the coming school year, if possible, appropriate measures to correct the existing effects of past segregation and discrimination against Black and Mexican-American children found by the Court to have been practiced by the Defendants in some elementary and junior high schools in Tucson Unified School District No. 1. The Court's decision contains no finding of segregation or discrimination in the high schools in Tucson Unified School District No. 1. In addition, the Court concluded that any issue relating to employment discrimination by Defendants was properly before the Court for consideration only insofar as it was relevant to the issues of intentional segregation of students.

The Court's decision identifies the

the following schools as having present effects of past intentionally segregative acts by the Defendants: Spring Junior High School, Safford Junior High School Brichta Elementary School, Cragin Elementary School, Jefferson Park Elementary School, Manzo Elementary School, Roosevelt Elementary School, Tully Elementary School, and University Heights Elementary School. The Court ordered the Defendants, in cooperation with the Plaintiff class representatives, to prepare a proposed plan or plans to remedy the segregation found to exist at these schools.

Following the Court's decision on June 5, 1978, Plaintiffs in these class actions filed Motions with the Court, asking that a number of additional schools be included among those found by the Court to have present effects of past intentional segregative acts by the Defendants. The Court has issued no decision with respect to

these Motions to date.

PROPOSED SETTLEMENT

On August 2, 1978, a proposed settlement of these class actions was presented to the Court jointly by the Defendants, the Plaintiff class representatives, and the Plaintiff-Intervenor United States of America. The terms of the proposed settlement are contained in a Stipulation of Settlement filed with the Court on August 11, 1978, a copy of which may be obtained at the offices of the School Board of Tucson Unified School District No. 1 Board located at 1010 East 10th Street, Tucson, Arizona. A copy of this Stipulation of Settlement is also available for examination at the office of the Clerk of the United States District Court, 55 East Broadway, Tucson, Arizona.

A general summary of the proposed settlement is as follows:

1. The nine elementary and junior high schools named hereinabove will be operated, commencing with the 1978-79 school year, in accordance with Option II of the plans submitted to the Court by Defendants on July 17, 1978 (insofar as Brichta, Manzo and Tully elementary schools are concerned), in accordance with Option III of the plans submitted to the Court by Defendants on July 17, 1978, (insofar as Cragin, Jefferson Park, Roosevelt and University Heights elementary schools are concerned), and in accordance with Option V of the plans submitted to the Court by Defendants on July 17, 1978, (insofar as Spring and Safford Junior High Schools are concerned). Copies of these plans and the Court order dated August 11, 1978, adopting a plan may be reviewed at the offices of the

School Board of Tucson Unified School District No. 1, 1010 East 10th Street, Tucson, Arizona.

2. Certain educational programs, testing procedures, instructional methods, and faculty assignment policies will be put into effect and/or reviewed by Defendants with the goal of eliminating racially or ethnically discriminatory practices.

3. Student assignment patterns at Utterback Junior High School and at Holladay and Borton elementary schools will be altered commencing with the 1979-80 school year so as to reduce the minority enrollment at these schools below approximately 50 percent minority. The procedures for the change in student assignment patterns at these schools will be developed during the 1978-80 school year through a process of public participation with review

by the Plaintiff class representatives and the United States Department of Justice.

4. Defendants will begin a process to determine whether future student assignment patterns at Davis, Drachman and Carrillo elementary schools should be changed or whether said schools should be closed, consolidated or continued. The procedures for the change in student assignment patterns, closures, consolidations, or other changes respecting these schools will be developed during the 1978-79 school year through a process of parent participation with review by the Plaintiff class representatives and the United States Department of Justice.

5. The effectiveness of the student reassignment decisions and of the changes in educational programs and related policies will be periodically

reviewed by the Court for a period of five (5) years. Therafter, the Defendants may request the Court to dissolve the Settlement Order and dismiss these class actions.

6. During the next five (5) years, the Defendants will not build new schools or additions at existing schools without authorization of the Court. Nor will Defendants during this five (5) year period engage in any acts or policies which substantially affect the racial or ethnic balance in any school in the District without Court approval.

7. The Plaintiff class representatives and the Plaintiff-Intervenor United States will not appeal any portion of the Court's decision of June 5, 1978. The Defendants shall pay to the attorneys for all the Plaintiffs the total sum of $500,000.00 for all

their attorneys' fees and costs incurred in connection with these actions.

You are reminded that the foregoing description of the proposed settlement is of a very general nature only and that the only complete statement of the terms of the proposed settlement is contained in the Stipulation of Settlement referred to above. If the settlement is approved by the Court, the agreement not to appeal the Court's decision of June 5, 1978, may be binding on members of the classes.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing will be held before the Court on Wednesday, August 30, 1978, at 8:30 a.m. at the United

States Courthouse, 55 East Broadway, Tucson, Arizona, to determine whether the proposed settlement of these class actions should be approved by the Court under Rule 23(e) of the Federal Rules of Civil Procedure. If so approved, the settlement will be binding on all persons to whom this Notice of Proposed Settlement is directed. At the hearing on Wednesday, August 30, 1978, any person to whom this Notice of Proposed Settlement is directed may either file written objections or appear and be heard, to the extent permitted by the Court. A person who objects to the proposed settlement but who does not advise the Court of such objections at the time of hearing may be waiving such objection and any rights to raise them in

in any appeal to a higher court.

DATED this 14th day of August, 1978.

W. J. FURSTENAU, Clerk
United States District Court
District of Arizona

By /s/
Dennis C. Cole
Deputy Clerk

APPENDIX M

J. Wm. Brammer, Jr.
Richard M. Yetwin
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Attorneys for Defendants other
that Defendant Lohr

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF REPORT OF ALL DEFENDANTS OTHER THAN ANITA LOHR

MENDOZA, et al,

Plaintiffs,

UNITED STATES OF AMERICA

Plaintiff-Intervenor,

vs.

TUCSON SCHOOL DISTRICT NUMBER 1, et al,

Defendants,

FILED: August 4, 1978

W.J. Furstenau, Clerk
U.S. District Court for
the District of Arizona

/s/
Deputy Clerk

Pursuant to Order of this Court entered July 18, 1978, Defendants submit this Report to inform the Court of the activities of and proceedings before the School Board since the Defendants' Plan was submitted on July 17, 1978. Additionally, as the Court has been informally notified by letter dated August 2, 1978, the Defendants have reached a settlement of all issues with Plaintiffs Fisher, et al., Plaintiffs Mendoza, et al., and Plaintiff-Intervenor, subject to the provisions of Rule of Federal Procedure No. 23 and approval of the Court.

One of the provisions of the settlement agreement is that, with respect to the Roosevelt, University Heights, Jefferson

Park and Cragin group of schools, Option III as it is included within the materials submitted to the Court on July 17, 1978 would be agreed upon by the parties for the Court's approval. This Option is different from the one (Option II) which was adopted by the School Board as its preferred Option for this group of schools. Other than that single difference, which is agreed to by the School Board only as a part of the settlement, no alteration in the Plan as submitted on July 17, 1978 is suggested by Defendants.

Included in the materials which are submitted herewith for the Court's consideration are transcripts of two additional public meetings which the School Board held on July 20 and 31, 1978 for the purpose of receiving further citizen comment on the proposed plan alternatives and any alternate plans which the citizens may have generated. These transcripts are self-explanatory.

Also submitted in the companion materials is evidence of the Defendants' efforts to inform the residents of the School District of the School Board's proposed plan. In addition to a special issue of the TUSD News which was mailed to the parents of District children and District employees during the week of July 24, 1978, the Defendants obtained the cooperation of the two daily newspapers in Tucson with the widest circulation in publishing the Defendants' preferred plan options. Copies of the TUSD News edition and press clippings are submitted.

The Court's July 17, 1978 Order required the parties to publicly disseminate the information contained in that Order. The Defendants included the essence of the Court's July 17, 1978 Order in the TUSD News Special Edition, and presume that, since it was mailed to those affected, the terms of the Court's Order have been met.

The School Board has received nine separate communications, to date, commenting on the proposed plan filed by the Defendants. Some of these documents suggest alternative solutions to the problems identified by the Court. These are materials which have been generated by members of the public for consideration by both the School Board and the Court. These materials have been considered by the School Board and are now being transmitted to the Court for review.

One further meeting was held on August 3, 1978 at 7:30 in the evening. At this meeting, School District staff presented the Plan adopted by the School Board to 20 members of the District Council of the School-Community Partnership Council, an organization created several years ago to provide the School Board with the input and cooperative effort of the members of the public. The Council members

present are to report the substance of this meeting to the school councils in each of the District's schools so that as many citizens as are interested may be informed on the issues.

Nothing further of substance is available at this time to report to the Court, although the Defendants will endeavor to bring these materials up to date as any changes occur.

RESPECTFULLY SUBMITTED this 4 day of August, 1978.

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.

By_____
J. Wm. Brammer, Jr.
240 North Stone Avenue
Tucson, Arizona 85701
Attorneys for Defendants
other than Defendant Lohr

Copies of the foregoing
hand delivered this 4th
day of August, 1978, to:

Rubin Salter, Jr., Esq.
and William J. Maledon, Esq.
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Attorney for Alberto Sanchez,
individually

Honorable William C. Frey
Judge, U.S. District Court
U.S. Courthouse
Tucson, Arizona 85701

APPENDIX N

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Attorneys for Defendants
other than Defendant Lohr

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV-74-90-TUC-WCF CIV-72-204-TUC-WCF JOINT MOTION OF PLAINTIFF-INTEVERNOR AND DEFENDANTS OTHER THAN LOHR FOR ENTRY OF SETTLEMENT ORDER

MENDOZA, et al,

Plaintiffs,

UNITED STATES OF AMERICA

Plaintiff-Intervenor,

vs.

TUCSON SCHOOL DISTRICT NUMBER 1, et al,

Defendants,

FILED: August 11, 1978

W.J. FURSTENAU, Clerk
U.S. District Court for
the District of Arizona

By s/s
Deputy Clerk

Plaintiffs Fisher, et al., Plaintiffs Mendoza, et al., Plaintiff-Intervenor United States and Defendants other than Lohr hereby respectfully move this Court for entry of the Settlement Order, approved by the above parties, and for entry of an order, after appropriate notice under Rule 23(e), Federal Rules of Civil Procedure, approving the

Stipulation of Dismissal signed by all parties who have appeared in these actions. As grounds for this Motion the above parties state as follows:

1. On June 5, 1978, this Court entered Findings of Fact and Conclusions of Law and an Order concerning issues raised in these consolidated cases and, inter alia, directing the development of plans to eliminate any constitutional violations found by the court.

2. On June 15, 1978, Plaintiffs Fisher and Plaintiffs Mendoza each filed motions requesting this Court to alter or amend its findings, conclusions and order and the Plaintiff-Intervenor joined in those motions, which are now pending before the Court.

3. In subsequent orders, this Court has directed a schedule for the filing of plans by the Defendants, the filing of objections or alternatives by the Plaintiffs

and Plaintiff-Intervenor, the submission of suggestions by the public and the holding of a hearing thereon.

4. Since the entry of this Court's Order of June 5, 1978, the above parties have conferred and engaged in a good faith effort to resolve this case without the need for resolution by the Court of the issues pending before it or further litigation between the parties on the issues in these cases and have agreed to the terms of the Stipulation of Settlement and Settlement Order, which have been filed simultaneously with this Motion. The above parties believe that resolution of the case by the terms of the Stipulation of Settlement is in the best interest of the parties and all others concerned.

5. Plaintiffs Mendoza, et al., have agreed to dismissal with prejudice of Counts 2, 3, 4, 5, 6 and 7 of their Amended Complaint and the other parties

have determined that such dismissal, as provided in the Stipulation of Dismissal signed by all parties herein, will not prejudice their interest or the interest of any class members represented by them. All parties have agreed to the dismissal of Anita Lohr as a Defendant.

6. The above parties agree that the filing of these papers may be made in lieu of the filing of objections or alternatives by Plaintiffs and Plaintiff-Intervenor and any responses thereto by the Defendants as provided in this Court's Order of July 17, 1978.

WHEREFORE, the above parties respectfully request this Court to:

(1) Enter the Settlement Order, filed herewith and approved by the parties;

(2) Approve the Stipulation of Dismissal filed herewith after appropriate notice; and

(3) Approve the filing of these

papers as in lieu of the filings required of Plaintiffs and Plaintiff-Intervenor by this Court's Order of July 17, 1978.

RESPECTFULLY SUBMITTED this 8th day of August, 1978.

s/s
Rubin Salter, Jr.
Attorney for Plaintiffs
Fisher, et al.

RESPECTFULLY SUBMITTED this 8th day of August, 1978.

s/s
William J. Maledon
Attorney for Plaintiffs
Fisher, et al.

RESPECTFULLY SUBMITTED this 8th day of August, 1978.

s/s
Michael O. Zavala
Attorney for Plaintiffs
Mendoza, et al.

RESPECTFULLY SUBMITTED this 8th day of August, 1978.

s/s
Morris J. Baller
Attorney for Plaintiffs
Mendoza, et al.

RESPECTFULLY SUBMITTED this 8th day of August, 1978.

s/s
J. Wm. Brammer, Jr.
Attorney for Defendants
other than Defendant Lohr

RESPECTFULLY SUBMITTED this 8th day of August, 1978.

s/s
John R. Moore
Thomas M. Keeling
Louie M. Stewart
Attorneys for Plaintiff-
Intervenor United States
of America

APPENDIX O

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members or the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members

not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Actions to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include

and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to present undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders

may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

APPENDIX P

CODE OF PROFESSIONAL RESPONSIBILITY

CANON 5. A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT.

ETHICAL CONSIDERATIONS

ED5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

INTERESTS OF A LAWYER THAT MAY AFFECT HIS JUDGMENT.

EC 5-2. A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

DISCIPLINARY RULES

DR 5-103. Avoiding Acquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

CANON 7. A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW.

ETHICAL CONSIDERATION

EC 7-9. In the exercise of his professional judgment on those decisions which are for his

determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.

DISCIPLINARY RULES

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonable available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102 and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

APPENDIX Q

Law Offices

MARTORI, MEYER, HENDRICKS & VICTOR

A Professional Association

July 7, 1978

J. William Brammer, Jr., Esquire
Richard M. Yetwin, Esquire
DeCONCINI, McDONALD, BRAMMER
& YETWIN, P.C.
240 North Stone
Tufson, Arizona 85701

Re: Tucson School Desegregation
Case/Settlement Matters

Dear Bill and Dick:

This letter is in response to your request that, in connection with the possible settlement of the remaining issues in this matter, the plaintiffs detail for you the amount of attorneys' fees and costs that they seek to have paid by the School District as a part of the settlement. This letter, however, relates only to the attorneys for the Fisher plaintiffs (No. C-74-90). It is my understanding that Mike Savala will be submitting to you today a similar letter on behalf of the attorneys for the Mendoza plaintiffs (No. C-74-204).

As a preliminary matter, let me point out that Rubin and I spent considerable time last night and again this morning reviewing time records and out-of-pocket costs. Taking into consideration some of

of the points that the two of you made to us several weeks ago concerning travel time, alleged duplication, and arguably unnecessary efforts, Rubin and I agreed that each of our law firms would delete several hundred hours from the total hours recorded in connection with this litigation. At the same time, Rubin and I agreed that, for purposes of this settlement discussion only, we would charge the remaining hours at a significantly reduced hourly rate with no added factors or multipliers for the inherent risks of the litigation and for the long period of time over which the litigation was carried by our two firms.

Rubin and I have concluded that the following is a reasonable proposal on behalf of the Fisher plaintiffs for payment of fees and costs by the School District in settlement of this litigation:

FEES: Between our firm and Rubin's firm, exclusive of the above-referenced hours that have been intentionally disregarded, there is a combined total of 6,388 hours of attorney time since the inception of this litigation. In addition, our two firms have a combined total of 2,413 hours of paralegal and law clerk time. (During the bulk of the time, the "law clerks" in question were law school graduates or lawyers admitted to the Bar.) We have applied a rate of $55.00 per hour to the attorneys' time and a rate of $15.00 per hour to the paralegal and law clerk time. This results in a total requested fee of $387,535.00

COSTS: After eliminating some out-of-pocket costs on the grounds that they were

of questionable recovery at best, Rubin and I added together the out-of-pocket costs of our two law firms since the inception of the litigation for such items as depositions, witness fees, expert fees, reproduction and copying, service of process, necessary travel and related expenses, equipment and supplies, miscellaneous unvouchered costs. The total of these out-of-pocket costs, for which we seek reimbursement from the School District is $104,381.52.

I think that it is appropriate to make two brief points concerning the foregoing. First, although you have raised some question concerning the reasonable value of Larry Hammond's time in light of his relative inexperience as a trial attorney, we believe (without necessarily agreeing with your position) that the requested rate of $55.00 an hour for all attorneys involved is unquestionably reasonable and more than offsets any arguments that you may have concerning the value of Larry's time. Second, although we do not necessarily agree with your arguments concerning unnecessary duplication and excessive travel time, we have (for purposes of this settlement proposal only) taken these factors into consideration in connection with both our total hours claimed and our hourly rate requested.

Needless to say, this letter and the figures contained herein are being submitted to you as part of a settlement proposal only. In the event that we are unable to arrive at a settlement of this matter, this letter is not deemed a waiver of our right to seek from the court

compensation for all hours expended at normal hourly rates of $65.00 to $85.00 per hour, together with appropriate multipliers for the risk and contingency factors, plus all out-of-pocket costs. Please let me know if you would like any further information concerning any of the foregoing.

Very truly yours,

/s/

William J. Maledon

WJM/cap

APPENDIX R

LAW OFFICES

BOLDING & ZAVALA

July 12, 1978

J. William Brammer, Jr., Esq.
DeConcini, McDonald, Brammer &
Yetwin, P.C.
240 North Stone
Tucson, Arizona 85701

Re: Desegregation Case Settlement.

Dear Mr. Brammer:

This letter is in response to your request that we submit to you our requested attorney's fees and costs in this case. As was done by the Fisher plaintiffs, we have reviewed our time records and out-of-pocket expenses to date. Taking into consideration that the District should not be charged for unnecessary duplication, the hours submitted to you here do not represent all of the hours spent by attorneys in this case. Also, the expenses of law clerks is included as costs and does not involve any profit to us. The figures represent the amounts actually paid by us for law clerks and, for settlement purposes only, we are seeking only to be reimbursed for those expenses.

Including the time spent by attorneys for MALDEF and this firm, the total attorney hours spent in the case for settlement purposes amount to 3,741. Unlike the Fisher plaintiffs, we are not setting any hourly rate at this time. Our total out-of-pocket expenses to date amount to $34,957.28.

As stated by the Fisher plaintiffs, this letter and the figures contained herein are submitted to you as part of a settlement proposal only. In the event we are unable to arrive at a settlement of this case, this letter is not to be deemed a waiver of our right to seek from the court compensation for all hours expended at the rates set by the court. If any additional information is needed, please feel free to call.

Sincerely,

BOLDING & ZAVALA

/s/
Michael O. Zavala

MOZ:amy
cc: Rubin Salter, Esq.

APPENDIX S

DeCONCINI McDONALD BRAMMER
& YETWIN, P.C.
Attorneys at Law

July 13, 1978

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Louie M. Stewart
Department of Health,
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40 United Nations Plaza
San Francisco, California 90104

Re: Fisher v. Lohr
No. CIV-74-90-TUC-WCF
Mendoza v. District No. 1
No. CIV-74-204-TUC-WCF

Gentlemen:

This letter is written to Messrs. Salter and Maledon as Counsel for Plaintiffs Fisher, et al, and all members of the class of Plaintiffs represented by the Fishers, et al, to Messrs. Zavala and Baller as Counsel for Plaintiffs Mendoza, et al, and all members of the class of Plaintiffs represented by Maria Mendoza, et al, to Messrs. Keeling, Stewart and Moore as Counsel for Plaintiff Intervenor, the Government of the United States of America, in response to the suggestions made by you, on behalf of your clients, that the above-captioned cause might be settled.

Specific elements for settlement have been communicated to me from Counsel for Fishers, et al, Mendoza, et al, concurred in by Counsel for the Government. These elements, it is my understanding, must be considered together with and in addition to the plan being submitted on July 17, 1978, by me, on behalf of my clients, as I understand them to have been proposed by the respective Plaintiffs' counsel, are as follows:

A. Respecting Plaintiffs Fisher, et al:

1. "Desegregation" of Borton and Holladay Elementary Schools.

2. Change in some fashion the pattern of elementary schools which "feed" their graduates into Utterback Junior High School.

3. With respect to Pueblo Gardens and Cavett Elementary Schools, either change the junior high school into which graduates are fed, or restructure the assignment of faculty to those schools so that not more than one Black teacher is on the faculty of either school.

4. Examine carefully, with a view toward improvement if necessary, testing instruments used by the District, as well as the Board's suspension and expulsion policy and its counseling program within the schools.

5. Consideration of the necessary in-service programs to reinforce the cultural awareness of District employees involved in the desegregation efforts, as well as examining the District's educational programs to determine the cultural diversity within the offerings, leading toward any necessary improvement in curricular offerings.

6. Consideration of adopting an affirmative-action or non-discrimination statement.

7. Examination of the District's personnel practices concerning hiring, placement and promotion.

8. Elimination within District schools of any concentration of Black employees.

9. Examination and improvement, if necessary, of the educational offerings respecting the basic skills of reading, writing and mathematics.

10. A determination of whether the existence of bilingual, English-Spanish program in schools adversely affects students who attend those schools but do not need the programs.

11. Consideration of the June 1978 "Programmatic Recommendations to Assist in the Quality Education of Black Students in Tucson" which I received from Mr. Salter on June 29, 1978, and which includes discussion of portions of the subject matter of Items #4, 5, 6, 7 and 9.

B. Respecting Plaintiffs Mendoza, et al:

1. Examination of Drachman, Carrillo, and Davis Elementary Schools with a view toward replacing them with a new, downtown school which will better allow the District to deliver educational services and an equal education opportunity to the students presently served by those three schools.

2. Examination and possible development of clear policies respecting promotion within the District's certificated job classifications.

3. Consideration, and adoption if necessary, of a specific reading program proposal which I received from Mr. Zavala on July 7, 1978, concerning the "Spalding" method of instruction.

C. Respecting both Plaintiffs Fisher, et al, and Mendoza, et al, agreement upon a sum certain to be paid by my clients to counsel for all Plaintiffs as and for their attorney's fees and costs incurred in the above-captioned causes.

D. In return for the above-enumerated items, and as express conditions for them, all Plaintiffs, both those specifically named and all class members, and the Plaintiff-Intervenor, must agree as follows:

1. Not to appeal or otherwise move to alter or amend in any way any order entered on or after June 5, 1978, in the above-captioned causes.

2. That on or before Jul7 1, 1983, assuming that my clients have theretofore complied with the reasonable reporting procedures required by the Court, my clients may apply to the Court having jurisdiction of the above-captioned causes, and that no opposition to such application would be made by

any plaintiffs, either those specifically named or any class member, or Plaintiff-Intervenor, for an order of the Court terminating and dismissing with prejudice the above-captioned causes as to all Defendants, releasing all Defendants from any further responsibility to Plaintiffs, both those specifically named and all class members, or Plaintiff-Intervenor based upon the orders of the Court theretofore made, and terminating finally and with prejudice any further jurisdiction of the Court over any and all Defendants in the above-captioned causes. In addition, the Defendants cannot be responsible for changes subsequent to the implementation of any portion of the plan in 1978 or thereafter of the racial and ethnic balance within the schools, when those changes are due to factors over which the District has no control, such as residential patterns or student exodus from the school system.

3. Stipulating to judgment in favor of all Defendants, and against all Plaintiffs, both those specifically named and all class members, and Plaintiff-Intervenor, on Counts 2, 5 and 6 of the Amended Complaint filed by and on behalf of Plaintiffs Mendoza, et al, which have been heretofore severed by the Court.

4. Stipulating that the motions heretofore filed by all Plaintiffs,

both those specifically named and all class members, and Plaintiff Intervenor, to alter, amend, supplement or make additional Findings of Fact and Conclusions of Law are moot and that the same be dismissed by the Court as moot.

5. That all Plaintiffs, both those specifically named and all class members, and Plaintiff-Intervenor will make no objections to, or suggested revisions of, the plan which will be submitted July 17, 1978 in response to the Court's June 5, 1978 Order.

6. Stipulation by all parties that any order entered in conjunction with paragraph D 2 be considered as fully and finally terminating and resolving any and all disputes which were or could have been raised between the parties, including all class members, in the above-captioned causes.

Based upon the foregoing elements expressed by all Plaintiffs for a complete and full settlement, and the required reciprocal agreements on the part of all Plaintiffs, this letter signifies the intent of my clients, pursuant to action taken by the Board of Education of Unified School District #1, Pima County, Arizona, on July 13, 1978, to settle finally and fully any and all disputes which were or could have been raised in the above-captioned causes between the parties, including all class members, as follows:

A. As to Plaintiffs Fisher's, et al, requests:

1. The student assignment patterns for Borton and Holladay Elementary Schools will be altered. The Board, however, does not want to limit itself to the options which have previously been shown to them and you. Although one of those options may ultimately be chosen, the Board does not wish to unilaterally impose an option upon unsuspecting parents and children in a settlement. Instead, the Board would establish a means by which the public will be informed of and involved in what result must be reached, and allow the public to advise the Board as to how the result should be reached

   The Board will immediately implement this process with a view toward having an option with respect to both Borton and Holladay ready for its review and action. The Board further envisions that a review by Counsel for all parties of the fruits of this process be conducted so that the process will produce a result which is palatable to Plaintiffs and consonant with constitutional principles.

   Should the Board's public process not produce a result satisfactory to either the Board or Plaintiffs, the Board will, on or before December 31, 1978, independently examine the issues and produce a plan for presentation to the Court

for its approval prusuant to paragraphs 5 and 7 of the Court's June 5, 1978 Order. Implementation of this student assignment adjustment would be targeted for the fall semester of the 1979-80 school year, subject to adjustments thereafter with Court approval.

2. Respecting the alteration of Utterback's attendance patterns, the Defendants agree that those patterns will be modified. Again, as with Borton and Holladay, the Board will utilize the advice of the public when reaching its decision. The process, timetable and procedures here would be the same as indicated in paragraph A 1.

3. Your concern regarding Pueblo Gardens and Cavett will be examined, particularly with respect to the propriety and reasonableness of Black teachers assigned to those schools. The Council of Black Educators will be involved in this assessment process and if it is determined that some reassignment of personnel is required, the Board will make the necessary adjustments, subject to the approval of the Court.

4. The District has recently adopted a uniform suspension and expulsion policy and administrative procedures to implement the policy. Copies are attached for your review, as I believe that your concerns have been adequately

addressed. Respecting your concerns relating to student evaluation and counseling procedures and techniques, the District agrees to continue its efforts to reinforce that no student will be discriminated against in this aspect of the District's educational program.

5. There will be in-service training of District employees involved in implementing the plan ordered by the Court, as well as any commitments made herein. Planning for this effort will be undertaken by District staff as soon as the Court approves each element of the plan and this understanding, and thereafter implemented as appropriate.

   In this regard, please see Dr. Florence Reynolds 6/30/78 and 7/10/78 memoranda. These memoranda also address your curricular concerns.

6. Please see a copy of a draft of a statement regarding non-discrimination in employment which the Board would adopt as a part of this settlement.

7. Contained within the proposed non-discrimination statement is a commitment to establish uniform procedures to address your concerns in these areas.

8. Although a concern has been expressed by you that Black teachers not be assigned in such a manner

as to isolate them by themselves, as a practical matter this should not be a problem. Assignment of Black teachers in all schools will be assessed during the 1978-79 school year. The Council of Black Educators will be involved in this process and if this examination indicates that reassignment of Black faculty is suggested, the Board will undertake such reassignment beginning in the 1979-80 school year.

9. Please refer, in response to those concerns, to Dr. Reynolds' memoranda dated 6/30/78 and 7/10/78.

10. It is the District's position that a child is not admitted to a bilingual instructional program without specific parental permission. Accordingly, the District must presume that any child in such a program must need it. However, an examination of your concern will be conducted and if any adverse affects are found respecting non-program students, they will certainly be addressed.

11. Again, Dr. Reynolds' memoranda of 6/30/78 and 7/10/78 briefly discuss the District's position and commitment respecting the concerns and proposals contained in the June 1978 document you presented to me. I have been assured by District staff, and the Board has so directed by authorizing this letter, that the legitimate concerns contained in that document will be addressed within the

District's total effort.

B. As to Plaintiffs Mendoza's et al, requests:

1. The student assignment patterns for Davis, Carrillo and Drachman Elementary Schools will be altered, and the Board is quite concerned with the manner in which any change in the assignment of students now attending Davis, Drachman, and Carrillo Elementary is to be handled. Accordingly, the Board wants to significantly involve citizens in any process which may result in any school closing or the reassignment of any pupils by permitting them to offer advice to the Board before any decision is made to close, consolidate, or continue to operate these schools and also offer the Board advice on the educational specifications of any new elementary school to be built in the inner city if such is to be the case.

   The Board will immediately implement this process with a view toward having an option ready with respect to these schools for its review and action. The Board further envisions that a review by Counsel for all parties of the fruits of this process be conducted so that the process will produce a result which is palatable to Plaintiffs and consonant with consitutional principles.

Should the Board's public process not produce a result satisfactory to either the Board of Plaintiffs, the Board will, on or before December 31, 1978, independently examine the issues and produce a plan for presentation to the Court for its approval pursuant to paragraphs 5 and 7 of the Court's Order of June 5, 1978.

2. Please refer to the attached proposed statement regarding nondiscrimination in employment. Contained within this document is a commitment to address the concern which you have raised.

3. Please refer to the attached District memorandum dated July 12, 1978, in response to this item, as well as the attached analysis of this program authored by Laura Banks.

As a result of these two memoranda, the District has a significant question respecting the advantage, if any, to students exposed to this program. However, if the parents of at least 25, but not more than 30 children, with full knowledge of the limitations of this program, remain interested in enrolling their children in this program, the District will offer such a pilot program. These volunteers must be available and signify in writing their intentions, including an acknowledgement of the program's limitations, by August 1, 1978, in order to

implement the program in the 1978-79 school year.

The District will provide a teacher for this program who is fully competent to instruct the "Spalding Method". However, that teacher will not necessarily be the person suggested by Counsel for Plaintiffs Mendoza, et al, but rather the teacher who is deemed by District personnel to be most competent to the task.

C. A letter dated July 7, 1978, addressing the attorneys' fees and costs issue, has been received by me from counsel for Plaintiffs Fisher, as applied only to them. I have also received a letter dated July 12, 1978 from counsel for Plaintiffs Mendoza, et al., which applies to them. This issue has been addressed by my clients and they have instructed me to tell you that the District will pay to all counsel for all Plaintiffs as and for all their attorneys' fees and costs, both past and future, the aggregate sum of $400,000.00 to be divided among them in any manner they see fit.

D. I solicit any comment which any of you may have with respect to the foregoing, and would appreciate it if you would please offer any comments in writing. In addition, I will require a written letter of intent from all counsel for Plaintiffs both those specifically named and all class members, and Plaintiff-Intervenor that the six requirements of settlement made by my clients herein are satisfactory and will be agreed to, providing my clients

adhere to the commitments it is suggested herein will be made by them.

I look forward to hearing from all of you soon.

Very truly yours,

DeCONCINI McDONALD BRAMMER
& YETWIN, P.C.

/s/
J. Wm. Brammer, Jr.

JWB:jo
Enclosures
cc: Edmund Kahn
Dr. Wilbur H. Lewis
Russell N. Jensen

APPENDIX T

LAW OFFICES

MARTORI, MEYER, HENDRICKS & VICTOR

A PROFESSIONAL ASSOCIATION

July 19, 1978

J. William Brammer, Jr., Esquire
DeCONCINI, McDONALD, BRAMMER
& YETWIN, P.C.
240 North Stone Avenue
Tucson, Arizona 85701

Re: Fisher v. Lohr, et al
No. CIV 74-90-TUC-WCF

Dear Bill:

On behalf of the Fisher plaintiffs, we hereby submit to you certain comments and requested changes with respect to the settlement proposal contained in your letter of July 13, 1978, to all plaintiffs' counsel. In addition, we hereby submit to you our tentative comments, objections, and suggested alternatives concerning the plan of desegregation that the Board has recommended to the Court with respect to the nine schools that Judge Frey has ordered desegregated.

As you know, this letter is merely preliminary to our scheduled meeting on August 1 to discuss the specifics of an initial stipulation of settlement. Some of the changes suggested herein will have to be refined somewhat, but this letter should give you some idea of our current

thinking. Suffice it to say that we have every reason to believe that the specifics of a stipulation or stipulations can be worked out if the general parameters of a settlement can be agreed to in principle.

RESPONSE TO LETTER OF JULY 13, 1978

For the sake of clarity and simplicity, we have inserted our comments and requested changes into the affected portions of your July 13 letter, a copy of which is attached hereto. Obviously, many of the changes that we have requested in your July 13 letter are for purposes of clarification only and do not indicate a difference of opinion as to the underlying substantive issues. To the extent that our requested changes do relate to substantive issues, we do not believe that our requests are unreasonable or outside the scope of a good faith effort to settle this matter without further litigation and expense.

Specifically, the purposes of our requested changes are as follows. The changes on page two of your letter are for clarification purposes only.

The changes on page three of your letter (see insert following your page three) are designed to address to some extent the concerns that we discussed with you on the phone on Monday. The language that we have suggested in this regard is, we believe, consistent with the intent of our proposed agreement.

The changes on page four of your letter are self explanatory, and do not in our opinion, reflect any significant departure from what you had proposed.

The changes on pages five, six and seven of your letter are for purposes of both clarification and specificity. These twelve numbered paragraphs will become the essence of our initial stipulation with defendants. Accordingly, we must have some greater specificity as to what defendants are willing to do, even though we fully realize that defendants cannot agree to specifics at this time because of the need for further community input concerning the available alternatives. For example, we do not believe that it is sufficiently specific for defendants to state merely that "the student assignment patterns for Borton and Holladay elementary schools will be altered." Such a statement, by itself, would technically permit the School Board to do nothing more than alter the attendance zones for Borton and Holladay by moving them a block or two in either direction without thereby having any significant impact on the racial and ethnic composition of the student enrollment at those schools. The language we have inserted at the end of the above-quoted sentence is designed merely to clarify the commitment that the School Board would make with respect to these schools as a part of the proposed settlement. The language in the remaining paragraphs on pages five, six and seven of your letter of July 13, 1978, is likewise designed to clarify and to bring greater specificity to the general commitment of the parties under the settlement proposal. We do not believe that any of these suggested changes results in a substantive alteration of what has been proposed by you and previously discussed with us, but we would be pleased to discuss the matter with you further if you do not agree with this position.

With respect to attorney fees and costs (see proposed changes on page eight of your letter of July 13, 1978), we would like to state at the outset that we do not believe that a disagreement on these matters should preclude a settlement. However, we do not feel that we could live with your current offer of $400,000 for all plaintiffs. As we pointed out in our letter to you of July 7, 1978, we had already substantially reduced our total hours on behalf of the Fisher plaintiffs in arriving at the proposed figure (for us alone) of $491,916.52. The considerable out-of-pocket costs involved and the large number of hours and costs claimed by the attorneys for the Mexican-American plaintiffs leave little room for recovery of any reasonable attorney's fees by us. Much of the expense of this litigation was financed by loans and temporary cost advances received by our two law firms (i.e., Kipps & Salter and Martori, Meyer, Hendricks & Victor). Under all of these circumstances, we do not believe that our counterproposal that the District pay $550,000 in fees and costs to all plaintiffs' attorneys is unreasonable. As pointed out above, however, we do not believe that this issue should preclude a settlement. Thus, if the Board is unwilling to reconsider its $400,000 offer, we suggest that a viable alternative might be to divorce this issue from our current settlement discussions and submit the issue of recovery of attorneys' fees and costs to Judge Frey under traditional recovery principles in cases such as this.

We recognize that your letter of July 13, 1978, is a sincere effort on defendants' part to pursue a good faith settlement of

this litigation. Presumably, defendants have likewise recognized that plaintiffs have made and are continuing to make every diligent and good faith effort to arrive at a settlement of this litigation. As you know, plaintiffs have made a number of substantial concessions in the course of the settlement discussions, and defendants no doubt feel that they have made some substantial concessions also. We believe that the basic elements of an agreement in principle are contained in your letter of July 13 with the addition of the changes that we have requested. We are hopeful that the settlement efforts will not stall at this point and we therefore look forward to a favorable response from you with respect to our requested changes in your July 13 letter.

PROPOSED PLAN OF DESEGREGATION

With respect to defendants' proposed plan of desegregation for the nine elementary and junior high schools which are the subject to Judge Frey's Order of June 5, 1978, our position is as follows:

1. With respect to defendants' recommendation concerning the Brichta-Manzo-Tully complex, we have no objection or sugtested alternatives and we are prepared to abide by this recommendation even though we do not necessarily agree that this option effectively desegregates these three schools.

2. With respect to defendants' recommendation concerning Spring and Safford Junior High Schools, we have no objections or suggested alternatives and we are prepared to abide by this recommendation on

the understanding that the measures taken are a preliminary step to the eventual closure of Safford and Mansfield Junior High Schools and the building of a new junior high school in that area to replace them.

3. With respect to defendants' recommendation concerning Roosevelt-University Heights-Jefferson Park-Cragin, we do have certain objections and suggested alternatives to present. Essentially, it is our position that defendants' recommendation with respect to these schools (i.e., known as Option II) unfairly and improperly places the burden of desegregation solely on the minority students. Indeed, defendants' proposed plan would bus minority students from the former Roosevelt attendance zone to Blenman and Cragin whole Anglo students in the Foothills area north of the Rillito River (who were previously bussed to Cragin and Jefferson Park) are to be transported to two predominately Anglo schools (i.e., Davidson and Whitmore). In addition, the defendants' proposed plan contains no indication as to what the long-range solution is for the Roosevelt-University Heights-Jefferson Park area. Presumably, any plan such as that proposed by the District should be accompanied by specific projections for the construction of new schools and the closing of existing schools so as to maintain desegregative gains and at the same time eliminate as much of the proposed transportation of students as possible. In light of these objections to and the apparent shortcomings in defendants' proposed plan with respect to these schools, we suggest (for sake of settlement purposes) the following alternatives:

A. Adoption by the Board of the option originally recommended to the Board by the District Staff. This option, as we recall, has the added advantage of producing a somewhat greater degree of desegregation of the schools identified by the Court as being unconstitutionally segregated, without placing the burden of desegregation solely on the minority students. As pointed above with respect to the District's current proposal, however, we believe that even this option must be accompanied by some specific projections for the construction of new schools and for the eventual reduction of the student transportation called for by the plan.

B. Alternatively, we suggest that the Board adopt a plan whereby Roskruge Elementary School becomes the focal point for the desegregation of the Roosevelt-University Heights-Jefferson Park-Cragin complex. This could be done, we believe, by (1) closing Roosevelt and University Heights, (2) increasing the Roskruge attendance zone to include all or some of the former Roosevelt zone (possibly that portion south of Speedway) and all of the former University Heights zone south of Elm Street, (3) transporting the former Jefferson Park Foothill students and the former Cragin Foothill students to Roskruge, (4) assigning the former Roosevelt students north of Speedway to Jefferson Park, and (5) assigning the former University Heights students north of Elm to Jefferson Park. The use of Roskruge in this manner would significantly reduce the number of students

who would have to be bussed who are not already being bussed to a similar extent. At the same time, the burden of desegregation would not rest solely with the minority students. This plan is perfectly consistent with the more long range goals of construction of a new shcool in the Foothills area as well as the contstruction of a new school in the Roskruge-Richey-Roosevelt-University Heights area which would be designed to maintain desegregative advances in that area of the city.

CONCLUSION

Consistent with our continued efforts and hope to arrive at an amicalbe settlement of this litigation, we are prepared to discuss any of the foregoing matters with you in greater detail, and will plan to do so at the August 1 meeting. If we are unable to arrive at a settlement of this matter, this letter is not to be deemed a waiver, either in whole or in part, of our rights to object to defendants' proposed plan or plans of desegregation, or to pursue any other rights and remedies that may be available to us. Moreover, since this letter is submitted to you as part of a settlement proposal, we would request that it not be made available to nor discussed with the press or the public without our consent.

We shall await your reply on or before August 1, 1978.

Very truly yours,

KIPPS & SALTER

BY/s/
RUBIN SALTER, JR., ESQUIRE

MARTORI, MEYER, HENDRICKS & VICTOR
A Professional Association

BY/s/
WILLIAM J. MALEDON, ESQUIRE

WJM/cap
Encl.

APPENDIX U

DeCONCINI McDONALD BRAMMER & YETWIN, P.C.
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July 26, 1978

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Re: Fisher v. Lohr
No. CIV-74-90-TUC-WCF
Mendoza v. District No. 1
No. CIV-74-204-TUC-WCF

Gentlemen:

This letter is written to Mr. Salter and Mr. Maledon as counsel for Plaintiffs Fisher, et al, and all members of the class represented by the Fishers, et al; to Mr. Zavala and Mr. Baller as counsel for Plaintiffs Mendoza, et al, and all members of the class of Plaintiffs represented by Maria Mendoza, et al; and to Mr. Keeling, Mr. Stewart and Mr. Moore as counsel for Plaintiff-Intervenor, the Government of the United States of America in reply to the response to our letter dated July 13, 1978, which was sent by the Plaintiffs; Fisher attorneys on July 19, 1978; by the Plaintiffs Mendoza's attorney on July 19, 1978; and by the Plaintiff-Intervenor's attorneys on July 20, 1978.

In order to facilitate a response to all of you this letter shall first reply to Plaintiffs' Fisher attorneys and shall begin with those materials found on page 4 of their letter under the subheading "Proposed Plan of Desegregation". Subsequent to making several comments which deal specifically with the plan for desegregation, this letter will reply to the suggestions made in Plaintiffs' Fisher responsive letter. In order to simplify the Board's reply to that response, we have taken Mr.

Brammer's July 13, 1978 letter and had it retyped including additions made by Plaintiffs which have been approved by the Board, paragraphs which were changed by the Plaintiffs but which the Board feels compelled not to change. Immediately following the retyped text of the July 13, 1978 letter will be a short memorandum which points out the changes made in the agreement by page and paragraph designation. The page and paragraph designation will be followed by one of the four statements below which explain the action taken by the Board:

1. Adopted as modified by Plaintiffs - this means that Plaintiffs' modification or the original July 13, 1978 letter has been adopted by Board action taken July 26, 1978.

2. Partially adopted as modified by Plaintiffs - this means that a part, but not all, of the requested modification has been accepted by the Board.

3. Unchanged in original - this means that the Plaintiffs did not change the original proposal letter and it has remained unchanged and has been retyped.

4. Modifications by Plaintiffs rejected, original language readopted - this means that the Board has rejected the proposed modification by Plaintiffs and has readopted the language of its original letter.

In the appropriate place after each of the above statements, some idea as to the Board's rationale will be stated, if

necessary, in rejecting or partially adopting the proposals by Plaintiffs.

PROPOSED PLAN OF DESEGREGATION

The Board is not in a position to consider the utilization of Roskruge Elementary as a focal point for the desegregation of the Roosevelt-University Heights-Jefferson Park-Cragin complex. As the Plaintiffs know, Roskruge is a very old school which is multi-storied and will be most difficult to modify to comply with the Rehabilitation Act of 1973 or the various architectural control acts which are now in effect and require elementary schools to be accessible to handicapped children.

The Board has, however, stated that it will, for settlement purposes only, rescind its vote taken on July 12, 1978 which adopted Option 3, as amended (which was, in effect, the proposed Option 2) and would be willing to adopt the original Option 3 without an amendment. The following copy of the July 13, 1978 letter, as modified, will still make reference to the July 17, 1978 plan as presented by the Board. If a settlement is reached, this paragraph will control. (See page 7, paragraph D 6.)

However, with respect to Option 3, the Board will not accompany that proposal by a specific projection for the contruction of a new school or for the eventual reduction of the student transportation called for by the plan. Any student transportation in this area has been prompted by and is a result of the lawsuit, and there is a possibility that the students involved could be transported indefinitely. This is a case with many students in the District at the present time, including the children referred

to in your letter as the foothills students. It should be apparent to you that the construction of a new school in the same area, without significant demographic changes, would be constructed as a racially imbalanced school

THE JULY 13, 1978 LETTER, AS MODIFIED

This letter is written to Messrs. Salter and Maledon as counsel for Plaintiffs Fisher, et al, and all members of the class of Plaintiffs represented by the Fishers, et al, to Messrs. Zavala and Baller as counsel for Plaintiffs Mendoza, et al, and all members of the class of Plaintiffs represented by Maria Mendoza, et al, to Messrs. Keeling, Stewart and Moore as counsel for Plaintiff-Intervenor, the Government of the United States of America, in response to the suggestions made by you, on behalf of your clients, that the above-captioned causes might be settled.

Specific elements for settlement have been communicated to me from counsel for Fisher, et al, Mendoza, et al, concurred in by counsel for the Government. These elements, it is my understanding, must be considered together with and in addition to the plan being submitted on July 17, 1978, by me, on behalf of my clients, to the Court pursuant to its order of June 5, 1978. These elements, as I understand them to have been proposed by the respective Plaintiffs' counsel, are as follows:

A. Respecting Plaintiffs Fisher, et al:

1. "Desegregation of Borton and Holladay Elementary Schools.

2. Change in some fashion the pattern of elementary schools which "feed" their graduates into Utterback Junior High School.

3. With respect to Pueblo Gardens and Cavett Elementary Schools, either change the junior high school into which the graduates are fed, or restructure the assignment of faculty to those schools so that a disproportionate number of Black teachers (taking the District as a whole) are not on the faculty of either school.

4. Examine carefully, with a view toward improvement if necessary, testing instruments used by the District, as well as the Board's suspension and expulsion policy and its counseling program within the schools.

5. Consideration of the necessary in-service programs to reinforce the cultural awareness of District employees involved in the desegregation efforts, as well as examining the District's educational programs to determine the cultural diversity within the offerings, leading toward any necessary improvement in curricular offerings.

6. Consideration of adopting an affirmative-action or non-discrimination statement.

7. Examination of the District's personnel practices concerning hiring, placement and promotion.

8. Elimination within District schools of any concentration of Black employees.

9. Examination and improvement, if necessary, of the educational offerings respecting the basic skills of reading, writing and mathematics.

10. A determination of whether the existence of bilingual English-Spanish programs in schools adversely affects students who attend those schools but do not need the programs.

11. Consideration of the June 1978 "Programmatic Recommendations to Assist in the Quality Education of Black Students in Tucson" which I received from Mr. Salter on June 29, 1978, and which includes discussion of portions of the subject matter of Items #4, 5, 6 7 and 9.

B. Respecting Plaintiffs Mendoza, et al:

1. Examination of Drachman, Carrillo, and Davis Elementary Schools with a view toward replacing them with a new, downtown school which will better allow the District to deliver educational services and an equal educational opportunity to the students presently served by these three schools.

2. Examination and possible development of clear policies respecting promotion within the District's certificated job classifications.

3. Consideration, and adoption if necessary, of a specific reading program proposal which I received from Mr. Zavala on July 7, 1978, concerning the "Spalding" method of instruction.

C. Respecting both Plaintiffs Fisher, et al., and Mendoza, et al, agreement upon a sum certain to be paid by my clients to counsel for all Plaintiffs as and for their attorneys' fees and costs incurred in the above-captioned causes.

D. In return for the above-enumerated items, and as express conditions for them, all named Plaintiffs, both on their own behalf and on behalf of all class members, and the Plaintiff-Intervenor must agree as follows:

1. That they will enter into an initial stipulation with Defendants containing essentially the same terms and conditions as set forth in this letter, which stipulation shall then be submitted to the Court for its approval in the form of an Order, enforceable by Plaintiffs and Defendants.

2. That, following the completion of the procedures set forth in paragraphs A 1 through A 3 and in paragraph B 1, following in this letter, they will enter into a

second stipulation with Defendants concerning the specifics of the plan called for by such paragraphs, which second stipulation shall be then submitted to the Court for its approval in the form of an Order, enforceable by Plaintiffs and Defendants.

3. That they will not appeal or move to alter or amend in any way the Court's Order of June 5, 1978, unless the Defendants fail to enter into or the Court fails to approve the stipulation called for in paragraph D 1 above, and until such stipulation has been entered into and approved by the Court, the Motions to Alter or Amend filed by Plaintiffs on June 15, 1978, shall remain under consideration by the Court without any ruling thereon so as to preserve Plaintiffs' rights under said Motions. Once said stipulation has been entered into and approved by the Court in a formal Order, the Motions to Alter or Amend filed by Plaintiffs on June 15, 1978, shall be deemed denied as moot. Notwithstanding any of the foregoing to the contrary, Plaintiffs and Defendants shall retain all rights and remedies provided by law or equity with respect to the stipulations referred to in paragraphs D 1 and D 2, above, including the right of appeal to a higher court concerning any Order of the District Court which refuses to enforce the Orders issued pursuant to such

stipulations. Any Orders issued by Judge Frey which enforce any Orders issued pursuant to these stipulations will not be appealable.

4. That on or before July 1, 1983, assuming that Defendants have theretofore complied with the stipulations and orders entered in the above-captioned causes and have complied with the reasonable reporting procedures required by the Court, my clients may apply, upon 30 days written notice to Plaintiffs, to the Court having jurisdiction over the above-captioned causes, and that no opposition to such application would be made by any Plaintiffs, either those specifically named or any class member, or Plaintiff-Intervenor, for an order of the Court terminating and dismissing with prejudice the above-captioned causes as to all Defendants, releasing all Defendants from any further responsibility to Plaintiffs, both those specifically named and all class members, or Plaintiff-Intervenor based upon the orders of the Court theretofore made, and terminating finally and with prejudice any further jurisdiction of the Court over any and all Defendants in the above-captioned causes. In addition, the Defendants cannot be responsible for changes subsequent to the implementation of any portion of the plan in 1978 or thereafter of the racial or ethnic

balance within the schools, when those changes are due to factors over which the District has no control, such as residential patterns or student exodus from the school system.

5. Stipulating to judgment in favor of all Defendants, and against all Plaintiffs, both those specifically named and all class members, and Plaintiff-Intervenor, on Counts 2, 5 and 6 of the Amended Complaint filed by and on behalf of Plaintiffs Mendoza, et al, which have been heretofore severed by the Court.

6. That all Plaintiffs, both those specifically named and all class members, and Plaintiff-Intervenor will make no objections to, or suggested revisions of, the plan which was submitted July 17, 1978 in response to the Court's June 5, 1978 Order.

7. Stipulation by all parties that any order entered in conjunction with paragraph D 4 be considered as fully and finally terminating and resolving any and all disputes which were or could have been raised between the parties, including all class members, in the above-captioned causes.

Based upon the foregoing elements expressed by all Plaintiffs for a complete and full settlement, and the required reciprocal agreements on the part of all Plaintiffs, this letter signifies the

intent of my clients, pursuant to action taken by the Board of Education of Unified School District #1, Pima County, Arizona on July 13 and 26, 1978, to settle finally and fully any and all disputes which were or could have been raised in the above-captioned causes between the parties, including all class members, as follows:

A. As to Plaintiffs' Fisher, et al, requests:

1. The student assignment patterns for Borton and Holladay Elementary Schools will be altered so as to reduce the current minority enrollment in these schools. The Board, however, does not want to limit itself to the options which have previously been shown to them and you. Although one of those options may ultimately be chosen, the Board does not wish to unilaterally impose an option upon unsuspecting parents and children in a settlement.

   Instead, the Board would establish a means by which the public will be informed of and involved in determining what result must be reached, and allow the public to advise the Board as to how the result should be reached.

   The Board will immediately implement this process with a view toward having an option with respect to both Borton and Holladay ready for its review and action. The Board further envisions that

particularly with respect to the propriety and reasonableness of Black teacher assignment to those schools. The Council of Black Educators will be involved in this assessment process and if it is determined that some reassignment of personnel is required, the Board will make the necessary adjustment, subject to the approval of the Court.

4. The District has recently adopted a uniform suspension and expulsion policy and administrative procedures to implement the policy. Copies are attached for your review, as I believe that your concerns have been adequately addressed. Respecting your concerns relating to student evaluation and counseling procedures and techniques, the District agrees to continue its efforts to ensure that no student will be discriminated against in this aspect of the District's educational program.

5. There will be in-service training of all District employees which will be required of all employees involved in implementing the plan ordered by the Court, as well as any commitments made herein. Planning for this effort will be undertaken by District staff as soon as the Court approves each element of the plan and this understanding, and thereafter implemented as appropriate.

a review by counsel for all parties of the fruits of this process be conducted so that the process will produce a result which is palatable to Plaintiffs and consonant with constitutional principles.

Should the Board's public process not produce a result satisfactory to both the Board and Plaintiffs, the Board will independently examine the issues and produce a plan for presentation to the Court and to Plaintiffs on or before December 31, 1978, for incorporation into a stipulation and order pursuant to paragraph D 2 above. Implementation of this student assignment adjustment will be completed no later than the commencement of the fall semester of the 1979-80 school year, subject to adjustments thereafter with Court approval.

2. Respecting the alteration of Utterback's attendance patterns, the Defendants agree that these patterns will be modified to reduce the current minority enrollment in that school. Again, as with Borton and Holladay, the Board will utilize the advice of the public when reaching its decision. The process, timetable and procedures here would be the same as indicated in paragraph A 1.

3. Your concern regarding Pueblo Gardens and Cavett will be examined

In this regard, please see Dr. Florence Reynolds' 6/30/78 and 7/10/78 memoranda. These memoranda also address your curricular concerns. In addition, it is understood that qualified parents and the Council of Black Educators will provide input and recommendations to the Educational Services Division as they complete the design for "Programmatic Recommendations to Assist in the Quality Education of Black Students in Tucson."

6. Please see the copy of a draft of a statement regarding non-discrimination in employment which the Board would adopt as part of this settlement.

7. Contained within the proposed non-discrimination statement is a commitment to establish uniform procedures to address your concerns in these areas.

8. Although a concern has been expressed by you that Black teachers not be assigned in such a manner as to isolate them from other Black teachers, as a practical matter this should not be a problem. Assignment of Black teachers in all schools will be addressed during the 1978-79 school year. The Council of Black Educators will be involved in this process and if this examination indicates that reassignment of Black faculty is desirable, the Board may undertake such reassignment beginning in the 1979-80 school year.

9. Please refer, in response to these concerns, to Dr. Reynolds' memoranda dated 6/30/78 and 7/10/78 and to paragraph 5 above.

10. It is the District's position that a child is not admitted to a bilingual instructional program without specific parental permission. In addition, the District agrees that no Black student will be submitted to such a program without first explaining the nature of the program and the available options to the student's parents. An examination of your concern (i.e., any adverse effect of the bilingual program on non-program Black students) will be conducted and if any adverse effects are found respecting non-program students, they will certainly be addressed.

11. Again, Dr. Reynolds' memoranda of 6/30/78 and 7/10/78 briefly discuss the District's position and commitment respecting the concerns and proposals contained in the June 1978 document you presented to me. I have been assured by District staff, and the Board has so directed by authorizing this letter, that all concerns contained in that document will be addressed within the District's total effort.

12. Any citizen's committee that is established to assist the Board in the monitoring or implementing of the District's plan will include

citizens of diverse ethnic and racial backgrounds, including but not limited to Mexican-Americans, Blacks, Anglos, Orientals and native Americans. This committee will include a member or members of the N.A.A.C.P., and shall be selected by the Board.

B. As to Plaintiffs' Mendoza, et al, requests:

1. The student assignment patterns for Davis, Carrillo and Drachman Elementary Schools will be altered, but the Board is quite concerned with the manner in which any change in the assignment of students now attending Davis, Drachman and Carrillo Elementary Schools is to be handled. Accordingly, the Board wants to significantly involve citizens in any process which may result in any school closing or the reassignment of any pupils by permitting them to offer advice to the Board before any decision is made to close, consolidate, or continue to operate these schools and also offer the Board advice on the educational specifications of any new elementary school to be built in the inner city if such is to be the case.

   The Board will immediately implement this process with a view toward having an option ready with respect to these schools for its review and action. The Board further envisions that a review

by counsel for all parties of the fruits of this process be conducted so that the process will produce a result which is palatable to Plaintiffs and consonant with Consitutional principles.

Should the Board's public process not produce a result satsifactory to both the Board and Plaintiffs, the Board will, on or before December 31, 1978, independently examine the issues and produce a plan for presentation to the Court for its approval pursuant to paragraphs 5 and 7 of the Court's Order of June 5, 1978.

2. Please refer to the attached proposed statement regarding non-discrimination in employment. Contained within this document is a commitment to address the concern which you have raised.

3. Please refer to the attached District memorandum dated July 12, 1978, in response to this item, as well as the attached analysis of this program authored by Laura Banks.

As a result of these two memoranda, the District has a significant question respecting the advantage, if any, to students exposed to this program. However, if the parents of at least 25, but no more than 30 children, with full knowledge of the limitations of this program, remain interested in enrolling their children in

this program, the District will offer such a pilot program. These volunteers must be available and signify in writing their intentions, including an acknowledgement of the program's limitations, by August 14, 1978, in order to implement the program in the 1978-79 school year.

The District will provide a teacher for this program who is fully competent to instruct the "Spalding Method." However, that teacher will not necessarily be the person suggested by counsel for Plaintiffs Mendoza, et al, but rather the teacher who is deemed by District personnel to be most competent for the task.

C. Omitted - requires additional data.

D. I solicit any comment which any of you may have with respect to the foregoing, and would appreciate it if you would please offer any comments in writing. In addition, I will require a written letter of intent from all counsel for Plaintiffs both on behalf of the named Plaintiffs and on behalf of all class members, and Plaintiff-Intervenor that the six requirements of settlement made by my clients herein are satisfactory and will be agreed to, providing my clients adhere to the commitments which will be made by them.

REPLY TO MEXICAN-AMERICAN RESPONSE DATED JULY 19, 1978

There does not seem to be a significant distinction between the material in our letter concerning the Mexican-Americans dated July 13, 1978 and their response thereto.

For purposes of clarification, however, several comments should be made.

First, the advisory group which is mentioned in the School Board's letter to all Plaintiffs envisions a group composed of parents of children attending Davis, Carrillo and Drachman Elementary Schools which would concern itself only with those schools. Any citizens' advisory group which would contribute to a plan for the future of all inner city schools would be made up of citizens from throughout the District.

Although the Plaintiffs may not specifically participate in the selection process of the teacher for the one year pilot "Spalding" program, the criteria utilized in selecting a teacher who is fully competent to instruct according to the "Spalding" method will certainly be given to the Plaintiffs. If a teacher currently employed by the School District is not available, one will be found and hired. The deadline for enrolling children in the program could be extended to August 14, 1978.

The Plaintiffs are not correct when they suggest that the District is utilizing only locally developed tests. Evidence presented at trial concerning

the testing of children in the School District should adequately answer the concerns by Plaintiffs.

With respect to paragraph 4 it is the Defendants' position that there is currently a standard procedure for staff promotions within the District which is being refined and shall be made available to you.

In reference to the attorney's fees requested by plaintiffs, please refer to the prior materials contained in this letter.

In reference to the letter received by the Defendants from the Plaintiff-Intervenor, the United States of America, the attorneys for the Defendants have responded to that letter by stating that it is too vague to respond to in the areas concerning approval of the options already presented to Judge Frey on July 17, 1978, and concerning any problems which the Plaintiff-Intervenor may have with the Richey School. Until such time as an adequate response is received from the Government, the Defendants have nothing additional that they can add in response thereto.

We look forward to meeting with you on August 1, 1978, in an attempt to resolve any difficulties which continue

subsequent to the transmittal of this letter to you.

Very truly yours,

DeCONCINI McDONALD BRAMMER
& YETWIN, P.C.

/s/
Richard M. Yetwin

RMY:jc

Enclosures

cc: Edmund Kahn
Dr. Wilbur H. Lewis
Russell N. Jensen